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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PUBLIC CITIZEN AND SIERRA CLUB,

Petitioners,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the role of the President in signing a trade agreement and submitting it to Congress for approval preclude judicial review of an agency's failure to comply with the National Environmental Policy Act's mandate that the agency include an environmental impact statement in its final recommendation to enter into the trade agreement, even where the lawsuit does not challenge or seek any relief with respect to the President's decisions or actions concerning the trade agreement?

PARTIES

In addition to Petitioners Public Citizen and Sierra Club, Friends of the Earth was a respondent below.

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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE,

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INTRODUCTION

This case raises important issues concerning the power of the federal courts to review a federal agency's refusal to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), with respect to trade agreements, legislative proposals, and other agency actions that require presidential involvement. Although there is no serious dispute that NEPA's plain language requires that respondent prepare an environmental impact statement ("EIS") on the North American Free Trade Agreement ("NAFTA"), the court of appeals ruled that the courts lack the power to declare that respondent has violated its legal obligation to comply with this requirement. The court reached this result by extending this Court's decision in

Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), to preclude a challenge to an agency's failure to comply with an independent statutory obligation, even though this lawsuit did not ask the court to review or set aside the President's decision.

The decision below is not limited to NAFTA or even to trade agreements generally, but rather would likely render NEPA's entire legislative EIS requirement judicially unenforceable. In reaching this result, the court of appeals disregarded more than two decades of NEPA jurisprudence, Executive Branch practice, and congressional understanding. Moreover, the result below is in conflict with the result in *Specter v. Garrett*, 995 F.2d 404 (3d Cir. 1993), which the government has asked this Court to review. *Dalton v. Specter*, No. 93-289 (petition filed August 23, 1993). Because of the court of appeals' departure from well-settled NEPA precedent and the confusion surrounding the applicability of *Franklin* to actions seeking enforcement of agencies' independent statutory obligations, this Court should review the decision below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which has not yet been reported, is reproduced at App. 1a-11a. The opinion and order issued by the United States District Court for the District of Columbia, which are reported at 822 F. Supp. 21, are reproduced at App. 12a-32a.

JURISDICTION

The court of appeals' judgment was issued on September 24, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Pertinent provisions of the Administrative Procedure Act, the National Environmental Policy Act, and the Council on Environmental Quality regulations are set forth at App. 35a-39a.

STATEMENT OF THE CASE

A. The Framework for Negotiating Trade Agreements.

Under Congress's constitutional power to regulate foreign commerce, Art. I, § 8, Congress could (and initially did) establish trade policy by setting tariffs in statutes. J. Jackson, *The General Agreement on Tariffs & Trade in U.S. Domestic Law*, 66 Mich. L. Rev. 249, 255 (1967). Alternatively, Congress could (as it eventually did) delegate some of its foreign commerce powers to the Executive Branch by authorizing it to set tariffs within certain limits and to enter into international trade agreements, subject to congressional approval.

The current Trade Acts delegate principal responsibility for negotiating trade agreements to the respondent Office of the U.S. Trade Representative ("USTR"), whose top four officials are appointed as ambassadors by the President with the advice and consent of the Senate. 19 U.S.C. § 2171(b), (c)(1)(C), (c)(2) & (4). The Office is statutorily charged not only with conducting international trade negotiations, but also with developing and coordinating the implementation of U.S. international trade policy and imposing retaliatory trade sanctions on other countries that violate trade agreements or impose unjustifiable burdens on U.S. commerce. *Id.* §§ 2171(c)(1)(A),(C)-(D); 2411-2417. In light of its statutory duties, the Office recognizes that it is "an agency in the Executive Office of the President." 15 C.F.R. § 2001.1(a); *see also id.* pts. 2004 & 2005 (agency subject to the Freedom of Information Act and Privacy Acts).

Under the Trade Acts, the President may set tariffs under certain conditions, but trade agreements addressing matters other than tariffs must be approved by both Houses of Congress before they may become effective. 19 U.S.C. § 2903. If the President complies with certain congressional notification and consultation requirements with respect to a

nontariff trade agreement entered into (*i.e.*, signed) prior to June 1, 1993, then the Trade Acts and congressional rules require Congress to follow fast-track procedures that prescribe tight time frames for congressional consideration of the agreement. *Id.* §§ 2191-2194, 2902-2903; *see also* Pub. L. No. 103-49, 107 Stat. 239 (1993) (extending fast-track procedures to Uruguay Round negotiations under the General Agreement on Tariffs and Trade, if President notifies Congress of intent to enter into the agreement no later than December 15, 1993, and the President signs that Agreement before April 16, 1994). Specifically, if the President notifies Congress at least 90 calendar days before he enters into a trade agreement, then he may thereafter submit legislation approving and implementing that agreement, which Congress must adopt or reject within 90 legislative days. 19 U.S.C. §§ 2191(c) & (e), 2903(a) (90 legislative days if revenue measures are included; 60 legislative days for other implementing legislation). Under fast-track procedures, no amendments may be made either to the trade agreement or to its implementing legislation, legislative debate is limited to 20 hours in each House, and a prompt floor vote is assured. *Id.* §§ 2191(d)-(g).

B. NAFTA.

In June 1991, the U.S. entered into trilateral negotiations with Mexico and Canada to establish a North American free trade zone. *See* 56 Fed. Reg. 32,454-55 (July 16, 1991). The Office of the U.S. Trade Representative coordinated the U.S. position and represented the United States in the negotiations.

In response to widespread concerns that a NAFTA would have adverse environmental effects in the U.S.-Mexican border area, and that it would make domestic health and environmental standards vulnerable to challenge as unfair trade barriers, the Office prepared both a draft and a final *Review of U.S.-Mexico Environmental Issues* during the first seven months of the NAFTA negotiations. That review

acknowledged that a NAFTA could have significant environmental effects particularly in the border area, where air and water quality already suffer from trade-induced development. However, the review did not assess the environmental effects of the final NAFTA or any other particular draft of it, but rather highlighted generic environmental issues arising in the negotiations. For this reason, neither the Office nor anyone else has ever contended that the review meets NEPA's EIS requirements.

In August 1992, the USTR and her counterparts announced that they had reached a final agreement on NAFTA, and in early September, the Office released a text of that Agreement to Congress and the public. On September 18, 1992, the President officially notified Congress of his intent to sign NAFTA, thereby commencing the 90-day waiting period under the fast-track procedures. 57 Fed. Reg. 43,603 (Sept. 21, 1992). On October 7, 1992, the USTR and her counterparts initialed the final NAFTA text, and President Bush signed that Agreement on December 17, 1992.

Since taking office, President Clinton has indicated that he will seek approval of NAFTA in its current form upon the negotiation of certain supplemental agreements, which have now been concluded. Although one of the supplemental agreements concerns enforcement of domestic environmental laws and enhancement of environmental protection and cooperation among the NAFTA countries, it does not change NAFTA itself in any respect. Thus, the President has not provided Congress with another 90-day notice for the supplemental agreements, nor does he intend to do so. Because the President has not yet submitted NAFTA and its implementing legislation to Congress, the 90 legislative-day period for congressional consideration has not begun.

The final NAFTA is a comprehensive trade agreement that establishes principles and rules that will govern North

American trade. It will have a number of significant environmental effects. First, NAFTA will likely lead to additional development in northern Mexico, which will have adverse environmental effects on both sides of the border. Second, it will increase trade-related truck and other land transportation, which will increase air pollution in all three countries. Third, NAFTA establishes rules for evaluating whether domestic food safety and other health and environmental standards impose impermissible trade barriers. NAFTA Ch. 7, subch. B & Ch. 9. If NAFTA is approved, then the U.S. will be obligated, as a matter of international law, to bring its laws and regulations into conformity with NAFTA. If it fails to do so, then another country may challenge that failure under NAFTA's dispute settlement procedures, and may be authorized to impose trade sanctions against the U.S., thereby creating enormous political pressure to change the offending measure. Ch. 20. Depending on the precise meaning of NAFTA's standards provisions, NAFTA may jeopardize a broad range of domestic measures, such as recycling requirements, fuel economy rules, automobile emission standards, pesticide residue bans, and restrictions on the transportation of hazardous materials. Fourth, by reducing tariffs and other trade barriers in some economic sectors but not others, NAFTA creates incentives for certain types of development, which will, in turn, have significant environmental impacts. For example,. NAFTA's energy chapter expressly permits incentives for oil and gas exploration, but not for renewable energy or energy efficiency, which will increase development of nonrenewable energy sources in all three countries. Art. 608(1).

C. The Prior Litigation.

Because of their concerns that the Office was not properly considering environmental issues in the NAFTA negotiations, as well as in the still-ongoing Uruguay Round of negotiations under the General Agreement on Tariffs and Trade ("GATT"), petitioners made a written demand to the Office in July 1991 for preparation of EISs on the two

agreements. The National Environmental Policy Act requires all federal agencies to include EISs in "every recommendation or report on proposals for legislation or other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The binding regulations issued by the Council on Environmental Quality ("CEQ") define "federal actions" to include "treaties and international conventions or agreements" and "proposals for legislation" to include "requests for ratification of treaties." 40 C.F.R. §§ 1508.17, 1508.18(b)(1). Despite the fact that federal agencies had prepared EISs on treaties and international agreements under every President since NEPA became effective in 1970, ranging from the Panama Canal Treaty to the Montreal Protocol on Substances that Deplete the Ozone Layer to the Micronesian Compact of Free Association, the Office had not begun preparation of EISs on NAFTA or the Uruguay Round.[1]

In August, 1991, after the Office made it clear that it had no intention of preparing such EISs, petitioners filed a lawsuit so that the Office would have sufficient time to prepare the EISs in response to a court order. In the district court, the Office admitted that it had never prepared an EIS on a trade agreement and that it would not prepare EISs on either NAFTA or the Uruguay Round, based on its belief that NEPA is inapplicable to trade agreements, no matter how significant their environmental effects. The district court dismissed the case on the grounds that, because neither NAFTA nor the Uruguay Round had yet been finally concluded, petitioners had not linked the effects of specific trade agreements to their members, and the controversy was not ripe. 782 F. Supp. 139, 142-43 (D.D.C. 1992).

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[1]Petitioners filed 19 such EISs as exhibits, and cited to several others.

On August 7, 1992, the court of appeals affirmed the dismissal of the complaint without reaching the standing issue or the merits. The court held that petitioners had failed to identify a *final* action that could be challenged under the Administrative Procedure Act ("APA"), since neither trade agreement had yet been concluded. 970 F.2d 916 (1992). The thrust of the court's opinion was that petitioners were too early in making their challenge, not that they would never be able to obtain judicial review of the Office's noncompliance with NEPA with respect to a final trade agreement.

D. This Litigation.

After the Office announced that it had reached a final NAFTA agreement and provided the NAFTA text to Congress, petitioners brought this lawsuit, under 28 U.S.C. § 1331, seeking a declaration that the Office had violated NEPA by failing to prepare an EIS on NAFTA and an order directing the Office to prepare such an EIS. In this litigation, petitioners did not, in any way, challenge the validity of NAFTA itself, or the President's decision to sign NAFTA. Nor did they seek to prevent the submission of NAFTA to Congress or Congress's consideration or approval of the Agreement.

On June 30, 1993, the District Court for the District of Columbia ruled in petitioners' favor, holding that "the plain language of the NEPA makes it a foregone conclusion that the [Office] must prepare an EIS on the NAFTA." App. 28a. Unlike the prior litigation, the court found the case appropriate for review because NAFTA had been finalized. App. 16a-17a. Addressing the government's argument that, under this Court's decision in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), this case challenged actions of the President, not the Office, the court examined NEPA, the CEQ regulations, and the case law. App. 18a-21a. Under these authorities, the district court concluded that the Office's failure to prepare an EIS on the NAFTA is reviewable under

the APA because the Office "is charged by statute with the responsibility for conducting international trade negotiations," and, "in substantial part, negotiated and drafted the NAFTA," even though the President signed it and will submit it to Congress for approval. App. 18a.[2]

Based on this opinion, the court issued a declaratory judgment that the Office must prepare an EIS on NAFTA and ordered the Office to prepare one forthwith. App. 33a-34a. It did not require that the EIS be prepared prior to the submission of NAFTA to Congress for approval, nor did it issue any injunctive relief forbidding the President from submitting NAFTA, or Congress from considering and approving it, without an EIS.

On September 24, 1993, without addressing the merits, standing, or the Office's separation of powers arguments, the court of appeals, relying exclusively on *Franklin*, reversed the district court's decision on the ground that "NAFTA is not 'final agency action' under the APA... and therefore is not reviewable by this court." App. 3a. According to the court, because only the President has the power to enter into NAFTA and to submit it to Congress for approval, NAFTA's effects are derived from the President's actions, and thus, under *Franklin*, no agency actions relating to the NAFTA may be challenged under the APA. App. 6a.

In responding to petitioners' contention that extending *Franklin* to this case would spell the death knell for judicial review of legislative EIS cases, the majority claimed that

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[2]The district court also rejected the Office's other arguments that the fast-track procedures relieve the Office of its NEPA obligations, App. 30a n.15, that NEPA's legislative EIS requirement violates the doctrine of separation of powers, App. 21a-22a, and, despite the extensive demonstration of harm in petitioners' lengthy affidavits and supporting exhibits, that petitioners lacked standing. App. 23a-28a.

review would be unavailable only where "the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties." App. 7a. However, because the President has the constitutional power to submit legislation to Congress on behalf of the Executive Branch, *see* U.S. Const. art. II, § 3, cl. 1, it appears likely that no legislative EISs would ever be judicially reviewable under the decision below.

Judge Randolph filed a concurring opinion, suggesting that, if language in *Franklin* is taken literally, there would still be no *final* agency action subject to review even where an agency (as opposed to the President) submits a legislative proposal directly to Congress. App. 9a-10a. In Judge Randolph's view, such a legislative proposal would not affect the parties until Congress enacted a bill embodying the proposal, and the President signed it. App. 10a. However, he noted the conflict between that result and *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976), in which this Court identified "'the time at which a court enters the process' to be 'when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement.'" App. 11a. Elaborating on this tension, Judge Randolph observed:

> The nub of the problem is that judicial review under the APA demands "final agency action" whereas the duty to prepare an impact statement arises earlier. The main objective of an impact statement is to ensure that the decisionmaker considers environmental effects prior to taking action.

Id. He concluded by noting that the courts would ultimately need to reconcile "*Franklin*'s direct-effects-on-the-parties test, as applied to NEPA suits . . . with the portion of *Kleppe v. Sierra Club*" identifying the appropriate time for judicial review in NEPA cases. *Id.* This petition seeks such a reconciliation.

Although the President has not yet submitted NAFTA to Congress, it is possible that he will do so and that Congress will act before this case is finally resolved. However, such congressional action would not render this case moot because it raises the threshold question of whether NEPA's EIS requirement applies at all to trade agreements. The court of appeals' decision effectively closes the gate to judicial resolution of that issue until this Court decides the effect of *Franklin* on reviewability of this type of EIS case. Moreover, because there is a limited time within which challenges can be brought to NEPA compliance on trade agreements, it is unlikely that this issue will ever be completely resolved by the courts with respect to a completed trade agreement before Congress acts on the agreement. For these reasons, even if this controversy becomes moot with respect to NAFTA, it would be capable of repetition yet evading review for the Uruguay Round (on which petitioners have already sued and still seek an EIS) and other future trade agreements.

REASONS FOR GRANTING THE WRIT

This Court should review the court of appeals' decision for three related reasons. First, the court of appeals' extension of *Franklin* to preclude judicial review of an agency's NEPA compliance runs counter to more than two decades of federal court precedent, Executive Branch practice, and congressional understanding of judicial review under NEPA. Second, this Court's review is needed to clarify the lower courts' confusion in applying *Franklin* to agencies' violations of their independent procedural obligations. More specifically, this decision conflicts with the Third Circuit's decision in *Specter v. Garrett*, 995 F.2d 404 (1993), allowing judicial review of agencies' procedural violations in connection with the President's base closing decisions, which the government has asked this Court to review. *Dalton v. Specter*, No. 93-289 (filed August 23, 1993). Third, the court of appeals misapplied *Franklin* to preclude challenges to an agency's failure to comply with its

independent statutory obligations, where that failure is not being used to challenge any presidential action.

A. The Decision Below Is Contrary To More Than Two Decades Of NEPA Understanding And Practice By All Three Branches Of Government.

This case warrants Supreme Court review because the court of appeals' decision runs directly counter to the three branches' longstanding understanding of judicial review of NEPA compliance with respect to legislative EISs and unsettles federal agencies' and the courts' obligations under NEPA.

1. *Two Decades of Judicial Review.* The decision below conflicts with two decades of judicial review under NEPA. For more than two decades, the federal courts have consistently construed NEPA to allow judicial review of EISs in connection with both major federal actions and legislative proposals, regardless of whether the underlying action involves presidential authority. They have done so under the logic of one of this Court's early NEPA decisions -- *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976), which established that the time for judicial intervention is "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." This Court focused on the agency's actions in issuing its report or recommendation, and acknowledged that both the obligation and judicial review arise at the proposal stage, rather than when the proposal becomes effective or adversely affects the parties. Since *Kleppe*, an agency's failure to issue an EIS with its report or recommendation has consistently been considered sufficiently final to be reviewable under the APA, even where some other step must be taken before the action will directly injure the plaintiffs. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (Court reviewed NEPA compliance with respect to agency permit for

development even though agency had to approve a subsequent development plan before construction could begin); *see also Defenders of Wildlife v. Lujan*, 112 S. Ct. 2130, 2142-43 n.7 (1992) (*dicta*) (person living adjacent to proposed dam site has standing to challenge licensing agency's failure to prepare EIS, "even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years").

Until now, the courts have not carved out an exception for legislative EISs. Instead, they have recognized that "NEPA establishes the environmental impact statement requirement for proposals for legislation in part to ensure that the public has an opportunity to participate meaningfully in decisionmaking at the administrative and legislative levels," and not simply to serve as a legislative aid. *Izaak Walton League v. Marsh*, 655 F.2d 346, 365 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981). Accordingly, federal courts have reviewed challenges to agencies' compliance with NEPA's legislative EIS requirement once the agencies have made their recommendations on the legislative proposal, even though Congress may change the proposal or choose not to enact it. *See, e.g., id.*; *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977); *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991). Indeed, in one case, the Ninth Circuit reviewed a challenge to the adequacy of the agency's announced procedure for issuing a legislative EIS *before* the agency issued its legislative proposal. *Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986) (judicial review of agency's plan to release legislative EIS without first obtaining public comment granted before agency issued legislative proposal or EIS).

Similarly, the courts have entertained NEPA cases concerning federal agencies' recommendations for legislative designations of areas to be accorded wilderness protection, even though Congress must pass a law affording that protection. *Idaho Conservation League v. Mumma*, 956 F.2d

1508 (9th Cir. 1992); *California v. Bergland*, 483 F. Supp. 465 (E.D. Calif. 1980), *modified*, *California v. Block*, 690 F.2d 753 (9th Cir. 1982); *Colorado Environmental Coalition v. Lujan*, 803 F. Supp. 364 (D. Col. 1992). In some of these cases, including one decided after *Franklin*, the pertinent statute required the agency to give its recommendation to the President who had the sole authority to submit proposed wilderness designations to Congress. Wilderness Act, 16 U.S.C. § 1132(b)-(e); *California v. Block*, *supra*; *Colorado Environmental Coalition*, *supra*. Even where the President actually modified the agency's proposal before submitting it to Congress, the President's intervening role did not render the NEPA claim unreviewable. *California v. Bergland*, 483 F. Supp. at 472; *California v. Block*, 690 F.2d at 758. Moreover, the courts have reviewed agencies' compliance with procedures prescribed in the CEQ regulations for EISs on statutorily mandated agency reports to Congress, even though Congress must take some action before the recommendations contained in the reports are implemented. *Trustees for Alaska*, *supra*; *NRDC v. Lujan*, *supra*.

In a subset of legislative EIS cases concerning appropriation requests, several lawsuits wound their way through the federal courts (including this Court) without any suggestion that the courts lacked authority to decide them. *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972). Those cases raised the question of whether NEPA requires agencies to prepare legislative EISs on their appropriation requests, which are, under the Constitution and as a matter of practice, submitted to Congress by the President. Although *Andrus* ultimately held that NEPA does not apply to appropriation requests, this Court never questioned its jurisdiction to reach this conclusion because the lawsuit challenged only the agency's NEPA compliance, not the President's budget.

Courts have also considered the merits of challenges

to agencies' NEPA compliance, even where the underlying action concerned military decisions or matters undertaken pursuant to international agreements.[3] Although these military and foreign affairs actions fall under the President's

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[3]*See, e.g., Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (failure to prepare EIS on incinerator in Antarctica); *No-Gwen Alliance, Inc. v. Aldridge*, 855 F.2d 1380 (9th Cir. 1988) (adequacy of EIS on emergency network of radio towers); *Romer v. Carlucci*, 847 F.2d 445 (8th Cir. 1988) (*en banc*) (adequacy of EIS on deployment of MX missiles pursuant to presidential basing recommendation approved by Congress); *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984) (agency's failure to prepare supplemental EIS on submarine communications system President decided to deploy); *Sierra Club v. Adams*; 578 F.2d 389 (D.C. Cir. 1978) (adequacy of EIS on U.S. participation in construction of Pan American highway pursuant to international agreement); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977) (adequacy of EIS on atomic missile submarine system); *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991) (failure to prepare EIS on removal of chemical weapons from Germany pursuant to presidential agreement, although EIS prepared on weapons' destruction and environmental analysis done on their transport on high seas); *NORML v. Department of State*, 452 F. Supp. 1226 (D.D.C. 1978) (failure to do EIS on U.S. effects of U.S. participation in Mexican herbicide spraying program); *People of Enewetak v. Laird*, 353 F. Supp. 811 (D. Hawaii 1973) (failure to prepare EIS on nuclear test program); *see also Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 796 (D.C. Cir. 1971) (court had jurisdiction to decide adequacy of EIS on underground nuclear test, but refused to do so on an expedited basis).

commander-in-chief or foreign affairs authority, and, in many situations, the President actually made the underlying decision, the courts have reviewed challenges to the *agency's* compliance with NEPA in connection with its role leading up to or implementing the President's decision.

2. *Executive Branch Practice*. The court of appeals' decision also defies two decades of Executive Branch practice of applying NEPA to agency recommendations on matters within the President's decisionmaking authority. Most significantly, while the CEQ regulations exclude the President from NEPA, they do not exclude all actions in which the President has a role. 40 C.F.R. § 1508.12. To the contrary, the CEQ regulations expressly include "treaties and international conventions or agreements" in the list of major federal actions subject to NEPA's EIS requirement, *id.* § 1508.18(b)(1), and specifically state that "[p]roposals for legislation include requests for ratification of treaties." *Id.* § 1508.17. Furthermore, the CEQ regulations envision that judicial review of agency compliance with those regulations, which petitioners sought in their complaint, would be available once the agency has either filed a final EIS or made a final decision not to do so, as the Office has done with respect to NAFTA. *Id.* § 1500.3.[4]

The CEQ has further reinforced the applicability of NEPA to legislative EISs in its identification of the agency action that triggers the legislative EIS requirement:

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[4]Executive Order 11,991, § 2(q), 3 C.F.R. 123 (1977 Comp.), expressly directs federal agencies to comply with the CEQ regulations except where compliance would be inconsistent with statutory requirements, and the CEQ regulations themselves state that they are binding on all federal agencies. 40 C.F.R. § 1500.3. This Court has stated that the CEQ regulations are "entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. at 358.

> "Legislation" includes a bill or legislative proposal to Congress *developed by or with the significant cooperation and support of a Federal agency* . . .. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation.

Id. § 1508.17 (emphasis added). Thus, under the CEQ regulations, the focus is not on the act of submitting the legislative proposal to Congress, but on the development of that proposal. Where an agency lends the requisite "significant cooperation and support" to the development of a legislative proposal, the CEQ regulations obligate it to prepare a legislative EIS, and, under the CEQ regulations, the agency can be sued if it fails to do so. *Id.* § 1500.3. Indeed, in many court challenges to federal agencies' compliance with NEPA regarding legislative-type EISs, the Executive Branch has not even questioned the federal courts' power to hear the challenges. *See Andrus*, *supra*; *EDF v. TVA*, *supra*; *Realty Income*, *supra*. Similarly, in cases concerning EISs on military and foreign affairs matters that could be said to fall within the President's constitutional authority, the government generally submits to the jurisdiction of the courts, even where the President plays a direct role in the underlying action. *See*, *e.g.*, *Wisconsin v. Weinberger*, *supra*; *Sierra Club v. Adams*, *supra*.

3. *Congressional Understanding*. Although preclusion of judicial review is a question of congressional intent, the court of appeals held that judicial review is precluded in NEPA cases in which the President has a role in the underlying action, even though nothing in NEPA provides the slightest hint that Congress intended to have the courts accord different treatment to different categories of EISs. To the contrary, NEPA's language and two decades of congressional treatment of NEPA suggests that Congress never intended to create such an exception to judicial review.

To begin with, NEPA imposes nondiscretionary duties on federal agencies of the sort that have traditionally been subject to judicial review. Thus, NEPA requires all federal agencies to include an EIS "in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). On its face, this provision imposes a mandatory obligation on federal agencies to prepare EISs on actions that come within its terms. *See Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971). Since Congress drafted NEPA with the knowledge that the APA enables federal courts to hear challenges to an agency's violation of such mandatory obligations, judicial review is available in the absence of a clear congressional intent to the contrary.

Moreover, NEPA makes no distinction among agencies' EIS obligations, depending on whether they relate to actions that an agency may take without legislation or to legislative proposals. NEPA's plain language, which begins with the legislative EIS requirement, reveals that Congress plainly anticipated that *agencies* would prepare EISs when they develop reports or recommendations on legislative proposals. Congress obviously knew that the President has the constitutional authority to recommend legislation, U.S. Const. art. II, § 3, cl. 1, yet it imposed the legislative EIS requirement on the agencies that develop and make reports and recommendations on legislation. By imposing this requirement on agencies, whose actions may be reviewed under the APA, NEPA's plain language provides evidence of congressional intent to allow judicial review of an agency's violations of NEPA in connection not only with major federal actions, but also with respect to legislative proposals.

This understanding is confirmed by Congress's express, but limited, exemptions from NEPA of certain actions in which the President has a role. For example, Congress has enacted NEPA exemptions for base closing

decisions, which are, by statute, made by the President, as well as for a statutorily mandated presidential report to Congress recommending a particular MX missile basing system. *See, e.g.*, Defense Base Closing & Realignment Act of 1990, Pub. L. No. 101-510, § 2905(c), 104 Stat. 1815 (1990) (base closing decisions); Dep't of Defense Appropriations Act of 1983, Pub. L. No. 97-377, 96 Stat. 1847-48 (1982) (MX missile basing systems). These exemptions would be wholly unnecessary if the court of appeals were correct in concluding that the President's decisionmaking authority eviscerated the power of the courts to enforce an agency's NEPA's obligations, but obviously Congress did not see it that way. Indeed, the Solicitor General recently conceded that Congress expressly exempted base closing decisions from NEPA, while allowing NEPA challenges to implementation of those decisions, because "it was necessary for Congress to draw an explicit line between permissible and prohibited NEPA suits." Government's Petition for a Writ of Certiorari in *Dalton v. Specter*, No. 93-289, at 25 n.20 (filed August 23, 1993).

* * *

For the past 23 years, the courts, consistent with congressional intent and Executive Branch practice, have entertained NEPA challenges to agency recommendations on matters on which the President has the final decisionmaking authority. In doing so, they have followed the plain language of NEPA requiring *agencies* to include EISs in their recommendations on major federal actions and on legislative proposals and the heretofore unquestioned tenet of *Kleppe*, 427 U.S. at 406 -- that courts may review an *agency's* failure to include an adequate EIS in its recommendation on such a proposal. The fact that the President may have ultimate constitutional authority over the action, or may have some further action to take, has never precluded such review.

In holding that judicial review is precluded even where the agency has taken the steps laid out in *Kleppe* for

bringing APA challenges, the court of appeals' decision sharply diverges from *Kleppe* and the longstanding practice under it. Not only does this decision defy more than two decades of NEPA practice and jurisprudence, but it effectively nullifies judicial review of NEPA's legislative EIS requirement and, quite possibly, of NEPA cases involving presidential decisions in other contexts. As Judge Randolph acknowledged in his concurrence, the inconsistency between *Kleppe* and the application of *Franklin* below needs to be reconciled, App. 11a, which can only be done by this Court.

B. Review is Necessary to Resolve the Lower Courts' Conflict in Applying *Franklin* to Agencies' Compliance with their Independent Statutory Obligations.

Review is also needed because the lower courts have reached inconsistent results in applying *Franklin* to challenges to agencies' violations of their procedural obligations in connection with matters in which the President has some involvement.

The pertinent portion of *Franklin* addressed the State of Massachusetts's attempt to have the President's census calculations set aside on the grounds that the Secretary of Commerce's report, on which those calculations were based, was arbitrary and capricious in violation of the APA. This Court concluded that, under the applicable census statute, the President had the final decisionmaking authority with respect to the decennial census calculations that he transmitted to Congress, and that the Secretary of Commerce simply made a recommendation to him. On that basis, and because the Court held that the President is not an agency subject to APA review, the Court held that Massachusetts could not obtain APA review of the census calculations. 112 S. Ct. at 2773-76.

The analogous challenge here would be to the President's statutory and constitutional role in deciding

whether to enter into trade negotiations, to sign a particular trade agreement, or to submit such an agreement to Congress for approval. Under *Franklin*, these presidential decisions are not subject to judicial review under the APA. That application of *Franklin* is neither new nor controversial.

Similarly, to the extent that *Franklin* stands for the proposition that the APA provides no basis for obtaining substantive review of advice given by agencies to the President, it hardly revolutionizes the legal landscape. More than forty years ago, this Court held in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corporation*, 333 U.S. 103 (1948), that a federal statute authorizing judicial review of agency orders did not permit judicial review in those situations in which the President had unreviewable discretion to make the final determination. As such, what amounted to no more than the agency's recommendations to the President could not be challenged as a means to set aside the President's ultimate determination.

Although *Franklin* itself does not revolutionize APA review, it has been applied inconsistently by the lower courts to challenges to agencies' violations of statutory procedures imposed on them (not the President) where the President has the ultimate decisional authority. Thus, the courts of appeals are divided on the question of whether the President's base closing decisions may be challenged because of procedural irregularities in the agency proceedings leading to agency recommendations on which the President relied in making his decisions. The courts of appeals have uniformly held that the courts may not embark on substantive review of the President's decision to approve or disapprove the base closing recommendations made by the Defense Base Closure and Realignment Commission, nor may they review the merits of the base closing recommendations made by the Commission or by the Secretary of Defense. However, they are divided on the issue of whether Congress intended to preclude judicial review of noncompliance by the Secretary or the Commission with certain procedural obligations

imposed by statute, namely that (1) the Secretary failed to transmit to the Commission and the General Accounting Office all the information used by him in making his recommendation, and (2) the Commission held some private meetings that should have been conducted as public hearings under the Act. In *Cohen v. Rice*, 992 F.2d 376 (1993), the First Circuit held that APA review was unavailable under *Franklin*, while in *Specter v. Garrett*, 995 F.2d 404 (1993), the Third Circuit held that review was available. The government has asked this Court to review the *Specter* decision to resolve the conflict. *Dalton v. Specter*, No. 93-289 (filed August 23, 1993).

The two cases considering whether judicial review of legislative-type EIS cases is available under *Franklin* have also reached conflicting results. Thus, in direct conflict with the decision below, *Colorado Environmental Coalition v. Lujan*, 803 F. Supp. 364, 370 (D. Colo. 1992), held that an agency's refusal to prepare a supplemental EIS on its wilderness designations is judicially reviewable, even though the President is charged by statute with submitting wilderness designations to Congress, which may differ from the agency's proposal, and Congress must pass a law affording such protection. Even the court of appeals' judges in this case could not agree on the effect of their ruling on future NEPA challenges. Thus, while the majority suggested that some legislative EIS cases could still be reviewed in the courts, App. 7a-8a, the concurrence suggested that *Franklin* marked the death knell for judicial review of all legislative EIS challenges. App.9a-10a.

Even if this Court hears *Specter*, it should also review this case because there is a critical distinction between this case and the base closing challenges. In the base closing cases, the plaintiffs are seeking to set aside the *President's* base closing decisions based on the *agencies'* violations of procedural requirements in making their recommendations to the President. In contrast, petitioners are not asking the courts to review, set aside, or otherwise issue any relief with

respect to the President's decisions to negotiate the NAFTA, sign it, or submit it to Congress for approval. Rather, petitioners seek a declaration that a federal agency (the Office) has an obligation to comply with a statute that imposes independent obligations on the agency to prepare an EIS. Indeed, in the only other NEPA case addressing the effect of *Franklin* on judicial review of legislative-type EIS cases, *Colorado Environmental Coalition*, 803 F. Supp. at 370, the court highlighted the fact that the plaintiffs sought no relief against the President.

This case is analogous to a claim under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, that a closed meeting dealing with NAFTA should be open, or to a lawsuit seeking access under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to documents about NAFTA. Judicial review in those cases would not be precluded simply because the President has the authority to decide whether to enter into NAFTA or to seek congressional approval of it. This is because the Office's obligations under FACA and FOIA, like NEPA, are independent of the President's role in entering into or submitting NAFTA to Congress, in contrast to the challenged action of the Secretary of Commerce in *Franklin*, which was part and parcel of the President's decision regarding the census data. Indeed, if the decision below correctly applies *Franklin*, then this Court would never have had to reach the difficult statutory and constitutional issues in *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), where the plaintiffs sought to compel the Department of Justice to comply with certain procedures in obtaining advice on judicial nominees. No one suggested that the President's constitutional role in nominating federal judges eliminated judicial review of the agency's compliance with independent statutory obligations in utilizing a federal advisory, committee, yet that is the logic of the court of appeals

application of *Franklin*. [5]

Thus, if the census statute had required the Secretary of Commerce to prepare a public census report as part of his advice to the President, and the Secretary failed to do so, surely the courts could, under the APA, review a challenge to the Secretary's violation of such a statute. Similarly, a member of the public who wanted to attend a hearing of the base closing commission could bring a lawsuit under the APA challenging the announced plan to close a hearing required to be open under the base closing statute. The difference between these hypotheticals and the challenges in *Franklin* and *Specter* is that the litigants would be seeking to enforce an independent obligation imposed by statute on the agency rather than trying to set aside a presidential action based on the agency's procedural irregularity. As Justice Scalia emphasized in his concurrence in *Franklin*, although the courts may rarely issue relief that runs directly against the President, they may still review agency actions implementing presidential decisions, *Franklin*, 112 S. Ct. at 2790 (Scalia, J., concurring in part, and concurring in judgment); *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and there is no reason why an agency's compliance with its independent statutory obligations should stand on a different footing.

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[5]While the FOIA contains its own judicial review provision and hence is not subject to the APA's "final agency action" requirement, it is inconceivable that Congress intended to make FOIA claims connected to presidential actions reviewable, but not comparable NEPA or FACA claims. Indeed, the courts have rejected the related contention that agencies are exempt from FOIA when they prepare records at the President's direction, or to assist the President in carrying out his functions. *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

Nonetheless, while the result below differs from that reached in *Specter*, there may be reasons (not relied on by the Third Circuit) for finding that Congress intended to preclude challenges to the President's base closing decisions that do not apply here. Thus, even if this Court hears *Specter* and decides that procedural irregularities in the agencies' proceedings cannot be the basis for setting aside the President's decisions, review of agencies' violations of their independent statutory obligations should still be available, as long as the relief sought is directed solely to obtaining compliance with those obligations, and not to upsetting the President's decision. Since this case seeks neither to set aside the President's decision to sign NAFTA, nor to prevent the President from transmitting NAFTA to Congress, *Franklin* does not preclude challenges to the Office's refusal to prepare an EIS, simply because that refusal is connected to a matter on which the President has final decisional authority. For that reason, this Court should grant the writ and hear arguments in this case at the same time as *Specter*, if it also decides to hear that case.

C. This Case Warrants Review Because the Court of Appeals Misapplied *Franklin*.

The court of appeals erroneously concluded that "the 'final agency action' challenged in this case is the submission of NAFTA to Congress by the President." App. 8a; *see also* at App. 3a ("we conclude that NAFTA is not 'final agency action'"). This characterization of the challenged action is wrong because petitioners are not challenging the NAFTA itself or the President's decision to submit it to Congress. Rather, they are challenging the Office's refusal to include an EIS in its recommendation that the United States enter into the NAFTA, which is analogous to the court's identification of the challenged action in the only other NEPA application of *Franklin*. *Colorado Environmental Coalition*, 803 F. Supp. at 370 (challenged action is "the Secretary's decision not to prepare a [Supplemental]EIS pursuant to NEPA").

Since the APA provides a right of action to persons "aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, and since petitioners are claiming a right under NEPA, the challenged action must be defined by reference to the agencies' NEPA obligations.

Because the court of appeals mischaracterized the challenged action, it also erred in its evaluation of *Franklin*'s core question: "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." 112 S. Ct. at 2773. The Office has unquestionably completed its decisionmaking process since it has made its final recommendation on a final NAFTA without an EIS; all subsequent actions with respect to NAFTA are in the hands of the President and Congress. The Office's failure to include an EIS in that recommendation, which *Kleppe* establishes is when NEPA compliance is both due and reviewable, is final action challengeable under the APA. 5 U.S.C. § 706(1); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (agency's failure to initiate a proceeding is final agency action); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (same). The Office's recommendation, as opposed to NAFTA itself, does not "present[] a moving target," nor is it "still subject to correction" by the President. *Franklin*, 112 S. Ct. at 2774, 2775.

With regard to the second prong of the *Franklin* test, the Office's failure to prepare such an EIS "directly affect[s] the parties" because it deprives them of statutorily mandated information on an action that will cause them harm if it is implemented. Indeed, the majority acknowledged that "the argument that the absence of an EIS 'directly affects' Public Citizen's ability to lobby Congress and disseminate information seems persuasive on its face." App. 7a. Nonetheless, it rejected this argument based on a D.C. Circuit decision on standing, which did not construe the APA's "final agency action" requirement, but simply held

that the plaintiffs lacked standing because they had not identified a specific agency action (like NAFTA) that triggered NEPA's requirements. *See Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991). On that basis, the majority truncated its analysis of petitioners' theory of the availability of APA review, without any further discussion. App. 8a.

Finally, and perhaps most significantly, the court of appeals' application of *Franklin* runs counter to the well-established presumption of reviewability of agencies' violations of statutory mandates, which is embodied in the APA's judicial review provisions. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *see also American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902). Prior to the APA, litigants, like the petitioners, could obtain agency compliance with nondiscretionary statutory duties by seeking a writ of mandamus. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 545 (1937); *Work v. U.S. ex rel. Rives*, 267 U.S. 175, 177 (1925); *U.S. ex rel. Kansas City Southern Railway Co. v. Interstate Commerce Commission*, 252 U.S. 178, 187 (1920). Since an agency's obligation to prepare an EIS is such a nondiscretionary duty, petitioners could have obtained judicial review of the Office's refusal to prepare an EIS by filing a mandamus action. *Calvert Cliffs*, *supra*; 28 U.S.C. § 1361. Although the APA sought to codify existing practice and eliminate technical barriers to obtaining judicial review, the court of appeals' construction of the APA's "final agency action" requirement to preclude judicial review of this case resurrects the type of technical pleading obstacles that the APA sought to render obsolete. Accordingly, the decision below is wholly insupportable under the APA.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted, and the case should be set for any argument held in *Dalton v. Specter*, No. 93-289.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued August 24, 1993 Decided September 24, 1993

No. 93–5212

PUBLIC CITIZEN; FRIENDS OF THE EARTH, INC.; SIERRA CLUB, APPELLEES

v.

UNITED STATES TRADE REPRESENTATIVE, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(92cv02102)

Drew S. Days, III, Solicitor General, argued the cause for appellants. On the briefs were *Ira S. Shapiro,* General Counsel, United States Trade Representative, *Peter R. Steenland, Jr.,* Acting Assistant Attorney General, and *Bradley M. Campbell,* Attorney, U. S. Department of Justice.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Patti A. Goldman argued the cause for appellees. With her on the brief were *Alan B. Morrison* and *Paul R. Q. Wolfson*. *Paul R. Q. Wolfson* also entered an appearance.

Janice A. Kaye filed the brief for Bipartisan Congressional *amici curiae* Senators Donald W. Riegle, Jr., et al.

Kathleen Rogers, *F. Kaid Benfield*, *S. Jacob Scherr*, *Robert F. Housman* and *Paul M. Orbuch* filed the brief for *amici curiae* Natural Resources Defense Council, et al.

Roderick E. Walston, Chief Assistant Attorney General, *Theodora P. Berger*, Assistant Attorney General, and *Craig C. Thompson*, Supervising Deputy Attorney General, State of California Department of Justice, filed the brief for *amici curiae* State of California, ex rel., et al.

Daniel J. Popeo and *Paul D. Kamenar* filed the brief *amici curiae* The Washington Legal Foundation, et al.

Johanna F. Chanin filed the brief for *amicus curiae* The Border Trade Alliance.

Joel D. Joseph filed the brief for *amicus curiae* Made in the USA, Inc.

John J. Rademacher, General Counsel, American Farm Bureau Federation, filed the brief for *amicus curiae* American Farm Bureau Federation.

Renea Hicks, State Solicitor of Texas, filed the brief for *amici curiae* State of Texas, ex rel., et al.

William E. Mooz, Jr., Attorney, filed the brief for The Amici States.

John J. Kim, *Amy F. Robertson*, *Louis R. Cohen*, *C. Boyden Gray* and *Stuart P. Green* filed the brief for *amici curiae* American Automobile Manufacturers Association, et al.

Thomas E. Patton entered an appearance for *amicus curiae* New York State Bar Association.

Before: MIKVA, *Chief Judge*, WALD and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* MIKVA.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

MIKVA, *Chief Judge:*

Appellees Public Citizen, Friends of the Earth, Inc., and the Sierra Club (collectively "Public Citizen") sued the Office of the United States Trade Representative, claiming that an environmental impact statement was required for the North American Free Trade Agreement ("NAFTA"). The district court granted Public Citizen's motion for summary judgment and ordered that an impact statement be prepared "forthwith." In its appeal of that ruling, the government contends that the Trade Representative's preparation of NAFTA without an impact statement is not "final agency action" under the Administrative Procedure Act ("APA") and therefore is not reviewable by this court. Because we conclude that NAFTA is not "final agency action" under the APA, we reverse the decision of the district court and express no view on the government's other contentions.

I. BACKGROUND

In 1990, the United States, Mexico, and Canada initiated negotiations on the North American Free Trade Agreement. NAFTA creates a "free trade zone" encompassing the three countries by eliminating or reducing tariffs and "non-tariff" barriers to trade on thousands of items of commerce. After two years of negotiations, the leaders of the three countries signed the agreement on December 17, 1992. NAFTA has not yet been transmitted to Congress. If approved by Congress, NAFTA is scheduled to take effect on January 1, 1994.

Negotiations on behalf of the United States were conducted primarily by the Office of the United States Trade Representative ("OTR"). OTR, located "within the Executive Office of the President," 19 U.S.C. § 2171(a) ("Trade Act of 1974" or "Trade Acts"), is the United States' chief negotiator for trade matters. OTR "report[s] directly to the President and the Congress, and [is] responsible to the President and the Congress for the administration of trade agreements . . ." *Id.* § (c)(1)(B).

Under the Trade Acts and congressional rules, NAFTA is entitled to "fast-track" enactment procedures which provide that Congress must vote on the agreement, without amendment, within ninety legislative days after transmittal by the President. The current version of NAFTA, once submitted, will therefore be identical to the version on which Congress will vote. President Clinton has indicated, however, that he will not submit NAFTA to Congress until negotiations have been completed on several side agreements regarding, among other things, compliance with environmental laws.

Public Citizen first sought to compel OTR to prepare an environmental impact statement ("EIS") for NAFTA in a suit filed on August 1, 1991. *Public Citizen v. Office of the United States Trade Representative*, 782 F. Supp. 139 (D.D.C.), *aff'd on other grounds, Public Citizen v. Office of the United States Trade Representative*, 970 F.2d 916 (D.C. Cir. 1992) (*Public Citizen I*). The district court dismissed Public Citizen's claim for lack of standing. This court affirmed but did not reach the standing issue. *Public Citizen I*, 970 F.2d at 916. Instead, we ruled that because NAFTA was still in the negotiating stages, there was no final action upon which to base jurisdiction under the APA. *Id.* Public Citizen's current challenge is essentially identical, except that the President has now signed and released a final draft of NAFTA. The district court granted Public Citizen's motion for summary judgment and ordered OTR to prepare an EIS "forthwith." *Public Citizen v. United States Trade Representative*, 822 F. Supp. 21 (D.D.C. 1993). The government appeals.

II. Discussion

The National Environmental Policy Act ("NEPA") requires federal agencies to include an EIS "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment...." 42 U.S.C. § 4332(2)(C). In drafting NEPA, however, Congress did not create a private right of action. Accordingly, Public Citizen must rest its claim for judicial review on the Administrative Procedure Act. Section 702 of

the APA confers an action for injunctive relief on persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; *see Public Citizen I*, 970 F.2d at 918. Section 704, however, allows review only of "*final* agency action." 5 U.S.C. § 704 (emphasis added); *see Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882 (1990). The central question in this appeal then is whether Public Citizen has identified some agency action that is final upon which to base APA review.

In support of its argument that NAFTA does not constitute "final agency action" within the meaning of the APA, the government relies heavily on *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). *Franklin* involved a challenge to the method used by the Secretary of Commerce to calculate the 1990 census. The Secretary acted pursuant to a reapportionment statute requiring that she report the "tabulation of total population by States ... to the President." 13 U.S.C. § 141(b). After receiving the Secretary's report, the President must transmit to Congress the number of Representatives to which each state is entitled under the method of equal proportions. 2 U.S.C. § 2(a)(2). The Supreme Court held that APA review was unavailable because the final action under the reapportionment statute (transmittal of the apportionment to Congress) was that of the President, and the President is not an agency. *Franklin*, 112 S. Ct. at 2773; *see Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (the President is not an "agency" within the meaning of the APA).

To determine whether an agency action is final, "[t]he core question is whether the agency has completed its decisionmaking process, *and* whether the result of that process is one that will directly affect the parties." *Franklin*, 112 S. Ct. at 2773 (emphasis added). The *Franklin* Court found that although the Secretary had completed her decisionmaking process, the action that would directly affect the plaintiffs was the President's calculation and transmittal of the apportionment to Congress, not the Secretary's report to the President. *Id.*

This logic applies with equal force to NAFTA. Even though the OTR has completed negotiations on NAFTA, the agreement will have no effect on Public Citizen's members unless and until the President submits it to Congress. Like the reapportionment statute in *Franklin*, the Trade Acts involve the President at the final stage of the process by providing for him to submit to Congress the final legal text of the agreement, a draft of the implementing legislation, and supporting information. 19 U.S.C. § 2903(a)(1)(B). The President is not obligated to submit any agreement to Congress, and until he does there is no final action. If and when the agreement is submitted to Congress, it will be the result of action by the President, action clearly not reviewable under the APA.

The district court attempts to distinguish *Franklin* by noting that unlike the census report (which the President was authorized to amend before submitting to Congress), NAFTA is no longer a "moving target" because the "final product . . . will not be changed before submission to Congress." 822 F. Supp. at 26. The district court goes on to say that NAFTA "shall" be submitted to Congress. *Id.* This distinction is unpersuasive. NAFTA is just as much a "moving target" as the census report in *Franklin* because in both cases the President has statutory discretion to exercise supervisory power over the agency's action. It is completely within the President's discretion, for example, to renegotiate portions of NAFTA before submitting it to Congress or to refuse to submit the agreement at all. In fact, President Clinton has conditioned the submission of NAFTA on the successful negotiation of side agreements on the environment, labor, and import surges. The President's position that the version of NAFTA negotiated by the OTR is the one that he "will" submit to Congress is irrelevant under *Franklin*. Indeed, in *Franklin* the President relied on the census report without making any changes, yet this did not affect the Court's analysis of whether the "final action" under the reapportionment statute was that of the President.

Public Citizen seeks to distinguish *Franklin* by arguing that the EIS requirement is an independent statutory obli-

gation for the OTR and thus the agency's failure to prepare an EIS is reviewable final agency action. But the preparation of the census report in *Franklin* was also an "independent statutory obligation" for the Secretary of Commerce. The Court held nonetheless that because the report would have no effect on the plaintiffs without the President's subsequent involvement, the agency's action would not have the "direct effect" necessary for "final agency actions." Furthermore, although the argument that the absence of an EIS "directly affects" Public Citizen's ability to lobby Congress and disseminate information seems persuasive on its face, this court has stated that an agency's failure to prepare an EIS, by itself, is not sufficient to trigger APA review in the absence of identifiable substantive agency action putting the parties at risk. *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991).

Finally, Public Citizen argues that applying *Franklin* in this case would effectively nullify NEPA's EIS requirement because often "some other step must be taken before" otherwise final agency actions will result in environmental harm. Public Citizen Br. at 43. In support of this position, it catalogs a number of cases in which courts have reviewed NEPA challenges to agency actions that require the involvement of some other governmental or private entity before becoming final. Public Citizen Br. at 40–44. Although we acknowledge the stringency of *Franklin*'s "direct effect" requirement, we disagree that it represents the death knell of the legislative EIS. *Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties. Moreover, *Franklin* notes explicitly the importance of the President's role in the "integrity of the process" at issue. *Franklin*, 112 S. Ct. at 2775. Congress involved the President and the Secretary of Commerce in the reapportionment process to avoid stalemates resulting from congressional battles over the method for calculating reapportionment. *Id.* at 2771. Similarly, the requirement that the President, and not OTR, initiate trade negotiations and submit trade agreements and their implementing legislation to Congress indicates that Congress

deemed the President's involvement essential to the integrity of international trade negotiations. When the President's role is not essential to the integrity of the process, however, APA review of otherwise final agency actions may well be available.

The government advances many other arguments opposing the preparation of an EIS, including weighty constitutional positions on the separation of powers and Public Citizen's lack of standing, as well as the inapplicability of NEPA to agreements executed pursuant to the Trade Acts in general, and NAFTA in particular. It also suggests that the judicial branch should avoid any conflict with the President's power by exercising the "equitable discretion" given it by § 702 of the APA. We need not and do not consider such arguments in light of the clear applicability of the *Franklin* precedent.

The ultimate destiny of NAFTA has yet to be determined. Recently negotiated side agreements may well change the dimensions of the conflict that Public Citizen sought to have resolved by the courts. More importantly, the political debate over NAFTA in Congress has yet to play out. Whatever the ultimate result, however, NAFTA's fate now rests in the hands of the political branches. The judiciary has no role to play.

In sum, under the reasoning and language of *Franklin v. Massachusetts*, the "final agency action" challenged in this case is the submission of NAFTA to Congress by the President. Because the Trade Acts vest in the President the discretion to renegotiate NAFTA before submitting it to Congress or to refuse to submit it at all, his action, and not that of the OTR, will directly affect Public Citizen's members. The President's actions are not "agency action" and thus cannot be reviewed under the APA. The district court's grant of summary judgment in favor of Public Citizen is, therefore,

Reversed.

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RANDOLPH, *Circuit Judge, concurring:* I agree with my colleagues that the injunction against the United States Trade Representative must be set aside. The National Environmental Policy Act requires "all agencies of the Federal Government" to include an impact statement in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment...." 42 U.S.C. § 4332(2)(C). Private parties may sue to redress alleged violations of this provision only after there has been "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704. *Public Citizen v. Office of the U.S. Trade Representative*, 970 F.2d 916, 918 (D.C. Cir. 1992), citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882 (1990). The majority holds that with respect to the North American Free Trade Agreement, there has been no "final" action because the President has not even transmitted NAFTA to Congress for its approval; and that if and when the President does submit the agreement and its implementing legislation, this would not qualify because, as *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), decided, the President is not an "agency."

I do not quarrel with either one of these rationales. But I get a bit concerned when the opinion announces that it is too early to toll the bell for judicial review in a "legislative EIS" case and then starts trying to limit *Franklin* (maj. op. at 7–8). The idea behind this is that proposing legislation to Congress can constitute "final ... action," and that when an "agency" rather than the President does the proposing, § 704 of the APA will be satisfied (maj. op. at 8). I am not so sure. *Franklin* held not only that the President is outside the APA's definition of "agency," but also that "action" cannot be considered "final" under the APA unless it "will directly affect the parties." 112 S. Ct. at 2773. When the alleged "action" consists of a *proposal* for legislation, how can this condition for judicial review be satisfied? In *Franklin*, the President's submission to Congress directly affected the parties because, under the "automatic reapportionment statute,"

congressional action was not required. 112 S. Ct. at 2771. In general, however, it is difficult to see how the act of proposing legislation could generate direct effects on parties, or anyone else for that matter. The head of an independent agency, a member of the President's Cabinet, or the President himself may send a letter to the Speaker of the House and the President of the Senate transmitting a draft of proposed legislation. Such "executive communications" are commonplace. *See* How Our Laws Are Made, H.R. Doc. No. 139, 101st Cong., 2d Sess. 4 (1989). Yet only a Member of Congress may introduce a bill embodying the proposal, and even then no one will be affected, directly or otherwise, unless and until Congress passes the bill and the President signs it into law. If one takes *Franklin* at its word, a legislative proposal's lack of any direct effects would seem to mean that there can be no final action sufficient to permit judicial review under the APA. Of course, there is a big difference between saying that APA review is unavailable and saying that officials do not have to comply with NEPA when they suggest legislation. If Congress believed an agency had not lived up to its obligation to prepare an impact statement, it could always refuse to consider the agency's proposal. Or, if Congress wanted to evaluate environmental impacts before putting the measure to a vote, congressional committees could hold hearings on the subject. This is how a large proportion of legislative proposals already must be treated. NEPA's impact statement requirement applies only to federal agencies. Members of Congress, who alone introduce bills and offer amendments, are not covered. Neither are private individuals, corporations, labor unions, citizen groups or other organizations, all of which frequently avail themselves of their First Amendment right to petition the government.

I am therefore not prepared to say whether in NEPA cases, the act of proposing legislation constitutes final action under § 704 of the APA, as *Franklin* has interpreted that provision. This is a troublesome question, bound to arise in future cases, and we should not stake out a position on it here. The nub of the problem is that judicial review under the APA demands "final agency action" whereas the duty to prepare an impact statement arises earlier. The main objective of an impact statement is to ensure that the decisionmak-

er considers environmental effects prior to taking action. This is why in *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976), the Court—without mentioning § 704 of the APA—identified the "time at which a court enters the process" to be "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." *Franklin*'s direct-effects-on-the-parties test, as applied to NEPA suits, may have to be reconciled with the portion of *Kleppe v. Sierra Club* just quoted. But there is no need to make the attempt in this case. It is enough to hold that regardless of whether the President's submission of NAFTA to Congress would be final action, there is no "final" action that can be attributed to an "agency."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*,

Plaintiffs,

v. Civil Action
No. 92-2102 (CRR)

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE

Defendant.

Filed
JUN 30 1993
NANCY M. MAYER-WHITTINGTON

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

For Plaintiffs: Patti Goldman, with Alan B. Morrison and Paul R.Q. Wolfson of the Public Citizen Litigation Group.

For Defendant: Bradley M. Campbell, with Samuel C. Alexander of the United States Department of Justice, Environmental and Natural Resources Division, and Roger B. Clegg, Acting Assistant Attorney General and Benedict S. Cohen, Acting Deputy Assistant Attorney General.

I. INTRODUCTION

Before the Court are the parties' cross Motions for Summary Judgment in the above-captioned case. In their Complaint, the Plaintiffs allege that the Defendant has failed to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, in the negotiation and conclusion of the North American Free Trade Agreement ("NAFTA"). More specifically, the Plaintiffs challenge the

Defendant's failure to prepare an environmental impact statement ("EIS") on the NAFTA and request that the Court order the Defendant to produce an EIS on the NAFTA before the President submits it to Congress. The NEPA requires that all federal agencies prepare an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

The Court held oral argument on the motions on May 25, 1993. After careful consideration of the papers filed by the parties, the arguments of counsel at the hearing, the underlying law, and the entire record in this action, the Court shall grant the Plaintiffs' Motion for Summary Judgment.

II. BACKGROUND

In 1991, the United States began trilateral negotiations with Canada and Mexico with the goal of establishing a North American free trade zone. *See* 56 Fed. Reg. 32,454-55 (July 16, 1991). These negotiations resulted in the NAFTA, a comprehensive document affecting every aspect of trade among the three countries. The NAFTA was signed by the trade representatives of the United States, Mexico and Canada on October 7, 1992[1]

The NAFTA is subject to the provisions of the Trade Act of 1974, as amended. *See* 19 U.S.C. § 2101 *et seq.*, ("the Trade Acts"). The Trade Acts provide that the Defendant United States Office of the Trade Representative ("OTR") shall serve as the President's chief negotiator in trade matters. *Id.* § 2171(c). The NAFTA will be submitted

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[1]The NAFTA addresses, *inter alia*, barriers to trade, intellectual property rights, and trade in goods. It also provides an exhaustive tariff schedule to govern trade between the three countries.

to Congress under the "fast track" approval process.[2] *See* 19 U.S.C. §§ 2191-2194, 2902-2903. Under the fast track process, the President submits the NAFTA to Congress along with implementing legislation and an explanation of the changes in the current law. 19 U.S.C. § 2903(a)(1)(B). The NAFTA must be approved by both Houses of Congress before it can become effective, and such approval occurs when the NAFTA's implementing legislation has been enacted by both the Senate and the House of Representatives. 19 U.S.C. § 2903(a)(1). Under the fast track process, once the NAFTA has been submitted to Congress, Congress has only 60 legislative days to approve or reject the agreement, *id.* § 2191(c) and (e); legislative debate is limited to 20 hours in each House, *id.* § 2191(f) and (g); and Congress may not change the implementing legislation or the Agreement. *Id.* § 2191(d). The President has no obligation to submit the NAFTA to Congress for ratification; however, he is expected to do so some time this fall. *See* John Dillin, *Kantor Says NAFTA Will Bring More Jobs*, Christian Science Monitor, June 23, 1993, at 2 (United States Trade Representative Mickey Kantor says that NAFTA should be ready for Congress in September.)

As noted earlier, the NEPA requires an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Plaintiffs are three nonprofit groups that have taken an active interest in the environment: Public Citizen, the Sierra Club, and the Friends of the Earth. They contend that the Defendant United States Trade Representative and the NAFTA are subject to the NEPA and

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[2]The fast track procedures are not statutory requirements but have been adopted as an exercise of the rule making power of the House of Representatives and the Senate. *See* 19 U.S.C. § 2191(a)(1).

bring this action for declaratory relief to compel the Defendant to prepare an EIS on the NAFTA before it is submitted to Congress. The Plaintiffs allege that this Court has jurisdiction in this suit under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, which provides for judicial review of a final agency action by a party adversely affected or aggrieved by agency action within the meaning of a relevant statute, here the NEPA.

As the Defendant admits no EIS was prepared on the NAFTA, the question before the Court is whether the NEPA and the APA provide relief to the Plaintiffs under these circumstances. In other words, the issue before the Court is whether the NEPA and the APA properly apply to the NAFTA and the OTR's action in negotiating, drafting and ultimately approving the NAFTA on behalf of the United States. As to these issues, the Defendant claims that: 1) there is no jurisdiction over this suit under the APA; 2) the Plaintiffs have no standing in this action; and 3) the NEPA does not apply to the NAFTA. However, the Court concludes that the plain language and policies of the APA and the NEPA apply to the NAFTA and the OTR. Furthermore, the Court finds that there is jurisdiction here under the APA and that the Plaintiffs' allegations of environmental harm are sufficient for purposes of standing under the NEPA. Finally, the Court determines that the Defendant has ignored the clear language and the legislative mandate of the NEPA in failing to prepare an EIS of the NAFTA, and, therefore, the Court shall grant summary judgment for the Plaintiffs.

III. THIS COURT HAS JURISDICTION OVER THIS ACTION UNDER THE APA BECAUSE THE DEFENDANT HAS TAKEN FINAL AGENCY ACTION IN ITS PREPARATION AND FINALIZATION OF THE NAFTA.

As a threshold matter, the Court concludes that it has subject matter jurisdiction under the APA for the Plaintiffs'

claims under the NEPA.

The same Plaintiffs filed an earlier challenge to the NAFTA in August 1991. At that time, the negotiations for the NAFTA had not yet been concluded and no agreement had been finalized. That action was dismissed by the district court. *Public Citizen v. Office of United States Trade Representative*, 782 F. Supp. 139 (D.D.C. 1992) (June Green, J.). The Court of Appeals affirmed the dismissal of that action, holding that there was no jurisdiction under the APA because there had not been any final agency action under section 704 of the APA. *Public Citizen v. Office of United States Trade Representative*, 970 F.2d 916 (D.C. Cir. 1992). The Circuit noted that there was no event triggering the agency's obligation to prepare an EIS because no final NAFTA agreement had been reached, as only incomplete drafts had been prepared. *Id.* at 919. Under these circumstances, our Court of Appeals believed that a suit challenging the NAFTA was premature. *Id.* The Plaintiffs now properly assert that the OTR has taken final action as to the NAFTA and there is jurisdiction under the APA in the instant action.

The Court begins, as our Court of Appeals did in the prior case, in analyzing the question of final agency action by examining the "NEPA itself, for it specifically identifies the time when an agency's action is sufficiently concrete to trigger the EIS requirement." *Id.* at 918. Our Court of Appeals explicitly stated that in order to challenge the NAFTA, the "[P]laintiffs must point to a specific proposal for legislation or other action 'at least arguably triggering the agency's obligation to prepare an impact statement.'" *Id.* at 918-19, *quoting Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991). In rejecting the Plaintiffs' earlier claim, our Court of Appeals explicitly noted that no final agreement had yet been produced in NAFTA negotiations and that it was unclear whether the negotiations would ever produce a final agreement. *Id.*

However, it is undisputed that the NAFTA agreement has now been finalized and signed by the United States, Canada, and Mexico. It is also undisputed that the NAFTA signed by the three countries is the same agreement that will be sent to Congress. Furthermore, under the fast track procedure, the agreement itself cannot be changed after it has been sent to the Congress for ratification. 19 U.S.C. § 2191(d).[3] Therefore, the Court concludes that the NAFTA agreement constitutes final agency action under the APA for purposes of this lawsuit.

A. THIS COURT HAS APA JURISDICTION BECAUSE THE DEFENDANT OFFICE OF TRADE REPRESENTATIVE IS AN AGENCY UNDER THE APA AND BECAUSE THE DEFENDANT HAS HAD SIGNIFICANT INVOLVEMENT IN THE PREPARATION, NEGOTIATION, AND DRAFTING OF THE NAFTA.

However, this does not end the Court's inquiry under the APA as the Defendant raises a related argument regarding jurisdiction that must be addressed as a threshold matter. The Defendant contends that there is no APA jurisdiction in this case because the President, and not the Defendant, is responsible for any final agency action on the NAFTA and there is no APA jurisdiction to review actions by the President. Defendant's Memorandum in Support of its Motion, at 15; *see Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) (no APA jurisdiction to challenge the actions of the President). More specifically, the Defendant claims that APA jurisdiction is improper here because: 1) the NAFTA is actually a result of the President's efforts, and not

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[3] Various side agreements are being negotiated by the three countries on topics related to the NAFTA. However, the Defendant does not claim that the NAFTA itself is not a final agreement by virtue of the negotiation of these side agreements.

that of the OTR for purposes of the APA and the NEPA; 2) the final agency action with regard to the NAFTA is its submission to Congress by the President and not simply its negotiation and the production of a final agreement; and 3) the President has no obligation to submit the NAFTA to Congress. However, the Court is not persuaded that such arguments preclude APA jurisdiction in this case and believes that the Defendant's arguments misread the language of the applicable statutes and the case law. The Court shall address each of these arguments in turn.

First, the Court concludes that the NAFTA is, in substantial part, a result of the work of the Defendant OTR and therefore reviewable under the APA and the NEPA. The Defendant Office of the United States Trade Representative is charged by statute with the responsibility for conducting international trade negotiations, developing and coordinating United States trade policy and imposing any retaliatory trade sanctions on other countries. *See* 19 U.S.C. §§ 2171, 2411-2417. It is undisputed that the Defendant OTR has, in substantial part, negotiated and drafted the NAFTA.

The Court again looks to the language and case law under the NEPA in order to understand whether the Defendant's actions regarding the NAFTA constitute final agency action under the APA. Under the NEPA, a federal agency is still required to prepare an EIS even if a project or proposal is not exclusively a federal agency endeavor. *See Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985); *cf. Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) (where U.S. Corps of Engineers granted a permit for part of a construction project, an EIS was required on the entire project). Furthermore, the Council for Environmental Quality ("CEQ"), which was established by the NEPA, has issued regulations pertaining to the NEPA and its interpretation of the NEPA is entitled to substantial deference. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (citations omitted); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989). The CEQ's regulations

specifically provide that, for purposes of the NEPA, legislation:

> includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a federal agency . . . . The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. . . . Proposals for legislation include requests for ratification of treaties.

40 C.F.R. § 1508.17 (1992); *see Andrus*, 442 U.S. at 357. The Court also notes that the CEQ regulations provide that major federal actions under NEPA include projects and programs entirely or partially conducted by federal agencies. 40 C.F.R. § 1508.18(a) (1992). Therefore, the significant actions taken by the Defendant OTR in negotiating and drafting the NAFTA are sufficient to trigger the EIS under the NEPA.[4]

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[4] The Office of the United States Trade Representative has a separate statutory basis for its authority and has many separate responsibilities aside from assisting and advising the President, *see* 19 U.S.C. § 2171, and thus, the OTR is an agency subject to the APA. *See Soucie v. David*, 448 F.2d 1067 (1971) (a component with substantial independent authority in the exercise of its functions is an agency); *see also Energy Research Foundation v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581 (D.C. Cir. 1990).

Furthermore, the Court notes that this finding is supported by the fact that the appointment of the OTR's top officials are subject to the advice and consent of the Senate, thus making them somewhat independent of the executive branch. 19 U.S.C. § 2171(b). In addition, the OTR is an agency under the Freedom of Information Act and the Privacy Act. *See* 15 C.F.R. §§ 2004, 2005 (1993).

Second, the Court concludes that the mere fact that the President submits the NAFTA to Congress does not bar review under the APA in this case. The Defendant principally relies on the Supreme Court's recent decision in *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), for its argument that the President's submission of the NAFTA to Congress prevents APA jurisdiction here. In *Franklin*, the Supreme Court held that there was no final agency action, and thus no jurisdiction under the APA, for the Secretary of Commerce's actions regarding the census. Under the automatic reapportionment statute at issue in that case, the Secretary of Commerce supervises the taking of the census, compiles the data and reports that information to the President. After receiving the Secretary's report, the President then has the statutory responsibility for transmitting a statement to Congress showing the results of the census and the number of Representatives to which each state is entitled. *Id.* at 2771. The Court in *Franklin* concluded that there was no APA jurisdiction of the Secretary of Commerce's actions because the President took the final action in reporting the census figures to Congress and such executive action was not reviewable under the APA.

The Defendant analogizes the President's submission of the census to the Congress to his submission of the NAFTA. However, such an analogy is misplaced. In *Franklin*, the Court reasoned that "[t]he core question is whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties." *Id.* at 2773. The Court concluded that no decision making process was completed where the census figure supplied by the Secretary to the President was actually a "moving target, even after the Secretary reports to the President." *Id.* at 2774. The Court noted that, even after the Secretary submits his report to the President, the census information can be amended before being transmitted to Congress, the President could instruct that the census be reformed, and that, in fact, the President

was not required to adhere to the policy decisions reflected in the Secretary's report. *Id.* at 2774-75. Thus, the census report in *Franklin* was "more like a tentative recommendation than a final and binding determination." *Id.* at 2774. On the other hand, the NAFTA is in stark contrast to the census report in *Franklin* because *the NAFTA is a complete and, most importantly, a final product that will not be changed before submission to Congress. The NAFTA that was negotiated and signed by the Trade Representative is the same document that shall be submitted to Congress and which is the subject of this suit.*

Third and finally, the fact that the President is under no obligation to submit the NAFTA to the Congress is not a bar to APA jurisdiction. Once again, a reference to the NEPA demonstrates why the actions by the Defendant here are final for purposes of APA jurisdiction and the preparation of an EIS. As discussed earlier, the NEPA requires that *an EIS must be prepared for legislative proposals. See Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981). The case law is clear that *an EIS must be prepared once such a proposal is completed and that its submission to Congress is not required. Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986) (noting that once Congress acts on a proposal, the aggrieved party may lose its right to judicial review). As the NEPA unambiguously requires an EIS on "proposals for legislation," 42 U.S.C. § 4332(2)(C), the Court concludes that an EIS on the NAFTA is required.

IV. THE EXERCISE OF APA JURISDICTION UNDER THE APA IN THIS CASE IS NOT A VIOLATION OF SEPARATION OF POWERS BECAUSE THE NAFTA HAS ALREADY BEEN DRAFTED AND APPROVED BY THE THREE COUNTRIES AND THE PREPARATION OF AN EIS WILL NOT INTERFERE WITH THE PRESIDENT'S AUTHORITY.

The Defendant further argues that an exercise of APA

jurisdiction in this case would violate separation of powers by infringing on the Executive's right and ability to conduct foreign policy. Defendant's Memorandum in Support of its Motion, at 20. However, such an argument is not persuasive in this case.

The Court concludes that the separation of powers doctrine does not bar the Plaintiffs' claims because an exercise of jurisdiction in this case under the APA and the NEPA is not an infringement of the powers of the President. In arguing that the EIS requirement will impede the President's power to conduct foreign policy, the Defendant conveniently ignores the fact that the power to regulate commerce with foreign nations is given to the Congress under the Constitution. *See* Constitution, Art. 1, Sec. 8, cl. 3.

Furthermore, assuming *arguendo* that the EIS requirement here raises a separation of powers question, the circumstances surrounding this lawsuit demonstrate that an application of the NEPA to the NAFTA will not impede the President's power in any meaningful way. The NAFTA is a completed document which has been signed and agreed to by the three heads of state for the United States, Canada, and Mexico. The only remaining step to be taken regarding the NAFTA is a domestic one, specifically, the submission of the NAFTA for approval by the Congress for possible ratification. The EIS requirement is, therefore, a domestic issue, where an agency must inform the relevant decision makers, in this case the Congress, of the environmental consequences of a proposal for legislation. *See* 42 U.S.C. § 4332(2)(C). Given the current posture of the NAFTA, the Court does not believe that the EIS requirement would so infringe on the President's power as to be a violation of the

doctrine of separation of powers.[5]

V. THE PLAINTIFFS HAVE STANDING TO CHALLENGE THE DEFENDANT'S FAILURE TO PREPARE AN EIS FOR NAFTA BECAUSE THE PLAINTIFFS ALLEGE SUFFICIENT AND COGNIZABLE INJURY.

The Plaintiffs claim that they have standing because the NAFTA, by its terms, will result in changes to federal and state law and policy in a variety of health and environmental matters and that these changes will have an environmental impact on them. Furthermore, the Plaintiffs argue that NAFTA will result in environmental changes to certain geographical areas, such as the area on the border between the United States and Mexico. Under these circumstances, the Plaintiffs contend that "the Court can determine whether NAFTA is likely to harm plaintiffs." Plaintiffs' Reply Brief at 9. The Court finds that the Plaintiffs' allegations, and the affidavits submitted in support thereof, establish standing under the NEPA.

It is clearly established law that:

> (t)he procedural and informational thrust of [the] NEPA gives rise to cognizable injury from denial of its explanatory process, so long as there is a reasonable risk that environmental injury may occur.

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[5]The Defendant's argument concerning separation of powers had more force in the prior suit regarding the NAFTA because the Plaintiffs were requesting that an EIS be completed before the conclusion of the NAFTA negotiations. *See Public Citizen v. Office of United States Trade Representative*, 782 F. Supp. 139 (D.D.C. 1992) (June Green, J.). However, such a suit was dismissed on other grounds and thus no infringement of Executive power occurred.

City of Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 492 (D.C. Cir. 1990).[6] The Court agrees with the Plaintiffs that the NAFTA will create binding obligations on state and federal agencies to conform with its terms. The NAFTA, by its very terms, sets forth criteria that may form a basis for challenging various domestic health and environmental laws. *See e.g.* Plaintiffs' Exhibit A (NAFTA, Chapter 7). Those laws that are found to be contrary to the NAFTA's free trade provisions either cannot be applied or can become the basis of trade sanctions.[7] In addition, by virtue of the Supremacy Clause, a state law that

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[6]In the prior suit brought by the Plaintiffs, the district court dismissed the action, holding that the Plaintiffs did not establish standing under the NEPA. *Public Citizen v. Office of U.S. Trade Representative*, 782 F. Supp. 139, 142 (D.D.C. 1992). More specifically, Judge June Green found that the Plaintiffs failed to establish standing derivatively through its members because it could not show that members' environmental or recreational interests would be harmed by a particular agency action. *Id.* However, as discussed earlier, no final NAFTA agreement had been reached when that suit was pending and thus any allegations of harm were premature. *Public Citizen v. Office of the United States Trade Representative*, 970 F.2d 916, 919 (D.C. Cir. 1992). In addition, our Court of Appeals did not reach the issue of standing in affirming the district court's dismissal. *Id.*

[7]The Plaintiffs set forth numerous health and environmental measures which may be set aside as contrary to the NAFTA, thus leading to injury. These include, *inter alia*, pesticide residue standards, chemical bans, bans on seafood imports based on certain environmental criteria, and pollution controls. *See* Wallach Affidavit.

conflicts with the NAFTA is preempted by the NAFTA. *See id.* (NAFTA, Article 105 (countries must "ensure that all necessary measures are taken" to comply with the NAFTA, including compliance by "state and provincial governments")). Thus, changes in federal and state law to conform with the NAFTA may very likely result in environmental injuries to certain members of the Plaintiff organizations, particularly those in California and Wisconsin. *See* Claybrook Affidavit ¶¶ 6-8; McCloskey Affidavit ¶ 5; Wallach Affidavit ¶¶ 53-57.[8] For example, the NAFTA could serve as a basis to challenge federal and state laws, such as the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 348 (c)(3)(A) & 376(b)(2), as well as California's Proposition 65, Cal. Health & Safety Code §§ 2549.5 *et seq.*, that prohibit certain carcinogens in water and food. *See* Wallach Affidavit ¶¶ 34, 55-56.

Furthermore, the Court notes that the allegations of possible environmental harm as a result of the NAFTA to members of the Plaintiff organizations who live on the United States-Mexico border region are sufficiently concrete

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[8]History demonstrates that the conflict between the NAFTA and other federal and local laws is far from hypothetical: For example, a dispute panel under the General Agreement on Tariffs and Trade, commonly referred to as GATT, has recently ruled that the Marine Mammal Protection Act impermissibly restricts Mexican trade in violation of GATT. *See* Plaintiffs' Exhibit C (GATT Panel Report, *United States - Restrictions on Imports of Tuna*, at 4O-42, 45-47 (1991)). The Marine Mammal Protection Act is an environmental statute that prohibits tuna imports from countries that use fishing methods that kill dolphins in greater numbers than domestic companies are permitted by the statute. 16 U.S.C. § 1371; *see Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297 (D.D.C.), *aff'd*, 540 F.2d 1141 (1976).

as to establish standing. *See* Audley Affidavit ¶¶ 6, 13-20, 39-47; Perkins Affidavit ¶ 12. In particular, the Court notes that a limited free trade zone along the United States-Mexican border, known as the Maquiladora program, demonstrates that the Plaintiffs' environmental concerns are not speculative. The Maquiladora program has resulted in grave environmental problems to those people living on either side of the border. *See* Audley Affidavit ¶ 21-26. These problems are so severe that the area has been called a "virtual cesspool and breeding ground for infectious diseases . . . ." Plaintiffs' Exhibit T, (Council on Scientific Affairs, "A Permanent US - Mexico Border Environmental Health Commission," 263 *JAMA* 3319, 3320 (1990)). The Plaintiffs also make claims as to the air quality on behalf of their members in specific metropolitan areas, such as San Diego, California, and El Paso, Texas, and allege that air quality in these cities will suffer as a result of the NAFTA. *See e.g.*, Claybrook Affidavit ¶ 8.

In fact, as part of its work on the NAFTA, the Defendant prepared a *Review of U.S.-Mexico Environmental Issues* ("the Review"), which identifies numerous environmental issues related to the NAFTA. *See* Plaintiffs' Exhibit D. The Review confirms that the NAFTA will have significant environmental effects and acknowledges that NAFTA may worsen the environmental problems already existing in the United States-Mexico border area. *Id.*, (Executive Summary at 3-7).[9] Such allegations of injury are

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[9]The Environmental Review was a general study conducted on the possible ramifications of the NAFTA but the Defendant does not contend that it qualifies as an EIS under the NEPA. It does not qualify as an EIS because it does not analyze the effect of the actual NAFTA, or identify and analyze other alternatives. 42 U.S.C. § 4332(2)(c); *see Natural Resources Defense Council v. Morton*, 337 F. Supp. 165 (D.D.C.) (Richey, J.), *aff'd*, 458 F.2d 827 (D.C. Cir.

sufficient for standing purposes. *See Public Citizen v. National Highway Traffic Safety Admin.*, 848 F.2d 265 (D.C. Cir. 1988); *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988); *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987).

The Defendant complains that many of the alleged environmental effects of the NAFTA are too widespread to be confined to a particular geographical location.[10] However, the absence of a geographical nexus does not defeat a claim of standing because that "would mean that the most injurious and widespread government actions could be questioned by nobody." *United States v. SCRAP*, 412 U.S. 669, 687-88 (1973).[11]

1972) (Leventhal, J.).

[10]Such claims include the allowance of pesticides on food imports from Mexico.

[11]In addition, the Plaintiffs allege that certain NAFTA provisions will cause a wide variety of other pervasive and adverse environmental effects. For example, they claim that NAFTA's reduction of trade barriers will cause a reduction in prices for domestic agricultural and meat products, thus creating pressure to intensify domestic production methods which will have a detrimental effect on the environment. *See* Plaintiffs' Exhibit A (NAFTA, Chapter 7); Ritchie Affidavit ¶¶ 4-8. In addition, the Plaintiffs allege that NAFTA's energy incentives for oil and gas exploration will encourage the use of nonrenewable energy resources. *See* Plaintiffs' Exhibit A (NAFTA, Chapter 6); Wallach ¶ 65. Finally, they claim that the NAFTA may have "pollution haven effects" in that domestic companies will move their operations to Mexico to avoid more stringent U.S. environmental laws. *See* Plaintiffs' Exhibit D (Review, Executive Summary at 7). While the Court does not rely on these allegations for

Thus, the Court concludes that standing is proper where allegation of environmental harms to particular members of the Plaintiff organizations are sufficiently concrete.[12]

VI. REQUIRING THE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT ON THE NAFTA BEFORE ITS SUBMISSION TO CONGRESS IS REQUIRED BY THE CLEAR LANGUAGE OF THE NEPA AND IS CONSISTENT WITH THE POLICIES BEHIND IT.

Having determined that the APA and the NEPA apply to the NAFTA, the plain language of the NEPA makes it a foregone conclusion that the OTR must prepare an EIS on

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purposes of standing, it does note that an EIS would help to clarify the extent and scope of the environmental impact of the NAFTA. *See supra* Section VI.

[12] The Court also notes that the Plaintiffs also allege standing on the basis of an injury to their organizational interests by claiming that they are unable to keep their members adequately informed. The Supreme Court has stated that such injury is within the zone of interest that the NEPA was designed to protect. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Such claims of informational standing have been rejected where a plaintiff has been unable to identify any particular agency action as the source of injury. *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991) (no EIS required for a federal agency's day-to-day operations). However, the Court is not convinced that such informational standing is wholly improper where the Plaintiffs are challenging a specific proposal for legislation such as the NAFTA.

the NAFTA.[13] The NEPA requires that all federal agencies "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement setting forth the environmental impact of the proposed action. 42 U.S.C. 4332(2)(C).[14] Furthermore, it is established law that "the policies, regulations and public laws of the United States shall be interpreted and administered with the policies of NEPA 'to the fullest extent possible.'" *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986) (*quoting* 42 U.S.C. § 4332; *citing Lathan v. Brinegar*, 506 F.2d 677, 687 (9th Cir. 1974) (en banc)). There is a narrow exception to the NEPA's EIS requirement only where compliance with the NEPA would result in a "clear and fundamental conflict of statutory authority." *Flint Ridge Development Co. v.*

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[13] The purposes of the NEPA are to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation...." 42 U.S.C. § 4321.

[14]The Court also notes that CEQ regulations require an EIS where federal actions "establish a precedent for future actions with significant effects or represent[] a decision in principle about a future consideration," 40 C.F.R. § 1508.27(b)(6), or "threaten[] a violation of Federal, State, or local law or requirements imposed for the protection of the environment," *id.* § 1508.27(b)(10), especially where those effects are "likely to be highly controversial." *Id.* § 1508.27(b)(4).

Scenic Rivers Ass'n., 426 U.S. 776, 791 (1976). However, such an exception is narrowly construed. *See Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986) (a 90-day time limit for issuing permits under the Marine Mammal Protection Act did not excuse compliance with the NEPA's EIS requirement). There is nothing in the fast track procedures or the Trade laws that specifies that the NEPA shall not apply to the NAFTA. The Court also notes that *other governmental entities, most notably the State Department, prepare EISs for international treaties*. 22 C.F.R. §§ 161.5(d), 161.7(d)(2) (1992). Furthermore, as the timetable for the NAFTA's submission to Congress is not explicit, the statutes here can be reconciled with the EIS requirement contained in the NEPA.[15]

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[15]The Defendant argues that requiring an EIS at this juncture will be unduly burdensome because there is inadequate time available for its preparation. However, the Court notes that the OTR could have very easily begun the EIS process earlier in the NAFTA negotiation process and thus any tight timetable for the preparation of an EIS on the NAFTA is entirely the result of the inaction by the prior administration.

In addition, our Court of Appeals noted that Congress retains the power to change its rules governing the fast track process and extend the statutory limit on its consideration of the NAFTA if it wishes to postpone such consideration until an EIS has been prepared. *Public Citizen v. Office of the United States Trade Representative*, 970 F.2d 916, 922 (D.C. Cir. 1992). Furthermore, it would be manifestly unjust to deny relief in this case on the grounds that there was inadequate time to prepare an EIS because the Plaintiffs brought their prior lawsuit specifically to ensure that they could obtain judicial review with ample time for the OTR to complete an EIS. *See Public Citizen v. Office of the United States Trade Representative*, 782 F. Supp. 139 (D.D.C.

Finally, the Court notes that the House of Representatives unanimously passed a resolution stating that "Congress will not approve legislation to implement any trade agreement if such agreement jeopardizes United States health, safety, labor, or environmental laws." H.R. Res. 246, 102nd Cong., 2nd Sess. (1992), and that certain Senators have requested that an EIS be prepared on the NAFTA.[16] Such events confirm that Congress is interested in the environmental effects of the NAFTA and would be aided by the preparation of an EIS.

VII. CONCLUSION

The NEPA, and the policies under it, clearly require that a federal agency prepare an environmental impact statement on every proposal for legislation significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). The Court finds that the Plaintiffs have demonstrated that there is a reasonable risk that the NAFTA may cause environmental injury and the Court concludes that the actions of the Defendant Office of the United States Trade Representative in negotiating, drafting, and signing the NAFTA are subject to review under the APA and NEPA. Therefore, the Court shall enter summary judgment for the Plaintiffs and order that the Defendant prepare an environmental impact statement on the NAFTA with all deliberate speed.

The Court notes that this agreement was negotiated by President Bush and his Trade Representative Carla A. Hill, and thus this lawsuit should not be construed as a failure of

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1992) (June Green, J.); Plaintiffs' Brief in Support of its Motion for Summary Judgment, at 13.

[16] *See e.g.*, Plaintiffs' Exhibit Z (Letter from Senator Patrick Leahy to Carla A. Hills, dated March 26, 1992, at 3).

the present Administration. However, such an impact statement is essential for providing the Congress and the public the information needed to assess the present and future environmental consequences of, as well as the alternatives to, the NAFTA when it is submitted to the Congress for approval. *See Natural Resources Defense Council v. Morton*, 337 F. Supp. 165 (D.D.C.) (Richey, J.), *aff'd*, 458 F.2d 827 (D.C. Cir. 1972) (Leventhal, J.).

The Court shall enter an Order of even date herewith in accordance with this Opinion.

June 30, 1993
Date

/s/
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*,

Plaintiffs,

v. Civil Action
No. 92-2102 (CRR)

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE

Defendant.

Filed
JUN 30 1993
NANCY M. MAYER-WHITTINGTON

ORDER

Before the Court are the parties' cross Motions for Summary Judgment in the above-captioned case. After careful consideration of the parties' Motions, all the papers filed in this case, and the applicable law, and for the reasons articulated in the Opinion of the Court of even date herewith, it is, by the Court, this *30th* day of June, 1993,

ORDERED that the Plaintiffs' Motion for Summary Judgment shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Defendant's Motion for Summary Judgment shall be and hereby is **DENIED**; and it is

FURTHER ORDERED that the Defendant Office of

the United States Trade Representative has acted contrary to law under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, by failing to prepare an Environmental Impact Statement on the North American Free Trade Agreement as required by the National Environmental Policy Act; and it is

FURTHER ORDERED that the Plaintiffs shall have a Declaratory Judgment that the Defendant Office of the United States Trade Representative must prepare an Environmental Impact Statement on the North American Free Trade Agreement pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332; and it is

FURTHER ORDERED that the Defendant shall prepare such an Environmental Impact Statement forthwith, and that the Court retains jurisdiction to determine an appropriate schedule for the issuance of the aforementioned Environmental Impact Statement if there is a dispute between the parties as to a reasonable timetable for its preparation; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, **DISMISSED** from the dockets of this Court.

/s/
Charles R. Richey
United States District Judge

Administrative Procedure Act

5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.. . .

5 U.S.C. § 704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.. . .

National Environmental Policy Act

42 U.S.C. § 4332

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall --

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
>
> (i) the environmental impact of

the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall

accompany the proposal through existing agency review processes . . ..

Council on Environmental Quality Regulations

40 C.F.R. § 1500.3

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).. . . The provisions of the Act and these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

40 C.F.R. § 1508.12

"Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary,

or the President, including the performance of staff functions for the President in his Executive Office.. . .

40 C.F.R. § 1508.17

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

40 C.F.R. § 1508.18

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility.. . .

> (b) Federal actions tend to fall within one of the following categories:
>
> (1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions and agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

Supreme Court, U.S.
FILED
DEC 10 1993
OFFICE OF THE CLERK

No. 93-560

In the Supreme Court of the United States

OCTOBER TERM, 1993

PUBLIC CITIZEN AND SIERRA CLUB, PETITIONERS

v.

UNITED STATES TRADE REPRESENTATIVE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether judicial review under the Administrative Procedure Act (APA) of claims asserting that the United States Trade Representative (USTR) must prepare an Environmental Impact Statement (EIS) on the North American Free Trade Agreement (NAFTA) pursuant to the National Environmental Policy Act (NEPA) prior to transmittal of the agreement to Congress has been rendered moot by congressional approval of NAFTA and its implementing legislation.

2. Whether the court of appeals correctly held that the President's responsibility for final action in concluding NAFTA and transmitting the agreement to Congress precludes APA review of claims that an EIS on NAFTA must be prepared prior to the President's conclusion and transmittal to Congress of the agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-560

PUBLIC CITIZEN AND SIERRA CLUB, PETITIONERS

v.

UNITED STATES TRADE REPRESENTATIVE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 5 F.3d 549. The opinion and order of the district court (Pet. App. 12a-32a) is reported at 822 F. Supp. 21.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1993. The petition for a writ of certiorari was filed on October 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a court of appeals decision requiring dismissal of their action for declaratory and injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. 702, 704, asserting claims under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). In that action, petitioners sought to compel the office of the United States Trade Representative (USTR) to prepare an environmental impact statement (EIS) for the North American Free Trade Agreement (NAFTA) prior to the President's conclusion of that agreement and his transmittal of the agreement to Congress for its consideration. President Bush signed NAFTA, and President Clinton concluded related agreements, during the course of the litigation below. Congress thereafter approved NAFTA and enacted legislation implementing the agreement during the pendency of the petition for a writ of certiorari.

1. NAFTA is an international agreement, subject to congressional approval and implementation through legislation, that creates a free-trade zone spanning the North American continent. The agreement is comprised of 22 chapters, numerous annexes, and an exhaustive tariff schedule that eliminate or reduce tariff and nontariff barriers to trade among the United States, Canada, and Mexico. Pet. App. 3a. NAFTA's terms include numerous provisions intended to enhance environmental protection throughout the three nations, including specific provisions affirming each country's right to maintain its own laws, regulations, and standards for the protection of human health and the environment.

The negotiation and conclusion of the agreement were marked by substantial and sustained presidential involvement, and direct presidential control over the agreement's conclusion and the timing and terms of its submission to Congress. President Bush personally initiated the process for developing NAFTA consultations with Mexico's President Salinas in 1990. Following later discussions with Canada's Prime Minister Mulroney, President Bush informed Congress of the proposed negotiations, which then began among the United States, Canada, and Mexico. See The Extension of Fast Track Procedures: Message from the President of the United States, H.R. Doc. No. 51, 102d Cong., 1st Sess. (1991) (reviewing origin of NAFTA). Those negotiations were marked by President Bush's frequent personal participation, and resulted in substantial agreement on a text that was published in September 1992. On September 18, 1992, President Bush notified Congress and the public of his intention to enter NAFTA. 57 Fed. Reg. 43,603 (1992); see 19 U.S.C. 2903(a)(1). Ninety days later, on December 17, 1992, President Bush, along with Mexico's President Salinas and Canada's Prime Minister Mulroney, signed the agreement. See C.A. App. 59 (declarations of NAFTA negotiator).

Upon his inauguration, President Clinton announced that he would transmit NAFTA to Congress only if the three countries could reach satisfactory side agreements on environment, labor, and import surges. Pet. App. 6a. The President initiated further negotiations on those topics and concluded additional agreements in late August, 1993. NAFTA and its implementing legislation were transmitted to Con-

gress on November 3, 1993, and approved on November 20, 1993.

2. NAFTA was negotiated, concluded, and submitted to Congress according to the terms of the Trade Act of 1974 and subsequent amendments, including the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. 2101-2191, 2901-2906) (the Trade Acts). In the Trade Acts, Congress established the office of USTR, located "within the Executive Office of the President," 19 U.S.C. 2171, as the President's chief negotiator for trade matters. USTR is a successor to the Office of the Special Representative for Trade Negotiations that President Kennedy created by executive order in 1963. See Exec. Order No. 11,075, 3 C.F.R. 103 (1963). In recognition of USTR's proximity to the President, the Trade Acts are replete with provisions in which Congress recognized that USTR's role is directly tied to the President's role in the conduct of international trade negotiations. 19 U.S.C. 2171(c)(1); see 19 U.S.C. 2171(c)(1)(E), 2902, 2903; see also 15 C.F.R. 2001.3(a)(1)-(17) (USTR "performs the functions of the President").

Further provisions of the Trade Acts recognize the primacy of the President in international negotiations and in the domestic processes of setting policies for trade negotiations and seeking congressional approval of any agreements that result. For example, the Trade Acts provide that Congress will give "fast-track" consideration under its rules to certain trade agreements and implementing bills submitted by the President. Those rules strengthen the President's hand in negotiations with foreign nations by providing that if the President adheres to specified notice

and consultation requirements, then Congress is obligated to take a timely vote on the agreement as transmitted by the President, without delay or amendment.

Under fast-track rules, as elsewhere in the Trade Acts, the President takes the operative steps in the process. The President has the option of invoking fast-track rules if "the President shall consult" with Congress prior to negotiations, *e.g.*, 19 U.S.C. 2902(c), and if "the President * * * notifies" Congress and the public of his intention to enter an agreement 90 days before doing so. 19 U.S.C. 2903(a)(1). After entering into the agreement, "the President submits a * * * final legal text of the agreement," and "(i) a draft of an implementing bill, (ii) a statement of any administrative action proposed to implement the trade agreement, and (iii) the supporting information described in [19 U.S.C. 2903(a)(2)]." 19 U.S.C. 2903(a)(1)(B). The supporting information must include, among other materials, a statement of how the implementing bill will change existing law, and of how the agreement meets the objectives of the Trade Acts. 19 U.S.C. 2903(a)(2).[1]

If the President decides to present a trade agreement in accordance with the fast-track rules, those rules provide for expedited consideration of the implementing legislation as a whole. The leadership in each House is to introduce the President's implementing bill on the day that he submits it. 19 U.S.C.

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[1] Fast track procedures are not statutory, but have been adopted "as an exercise of the rulemaking power of the House of Representatives and the Senate," 19 U.S.C. 2191(a)(1), "with full recognition of the constitutional right of either House to change the rules * * * at any time." 19 U.S.C. 2191(a)(2).

2191(c)(1). House and Senate committee and floor consideration, and votes by each chamber, must occur no more than 90 legislative days after submission. 19 U.S.C. 2191. No amendments to the implementing legislation are permitted, 19 U.S.C. 2191(d), and debate in each chamber is limited to 20 hours. Further restrictions ensure that the process is not undermined by dilatory motions. 19 U.S.C. 2192(d) and (e). NAFTA was negotiated, concluded, and considered by Congress under the terms of the fast-track process.

3. In 1991, petitioners filed an initial challenge to NAFTA in the United States District Court for the District of Columbia, raising the same claims at issue in this case. Pet. App. 4a. Petitioners named both the President and USTR as defendants in that case, and they initially sought an injunction directed against both defendants. Petitioners sought that relief on the basis of an alleged failure by the President and USTR to comply with NEPA in negotiations toward a NAFTA and in the Uruguay Round of multilateral trade negotiations pursuant to the General Agreement on Tariffs and Trade (GATT).

The initial case was filed during the pendency of negotiations toward a NAFTA, but before the agreement had been concluded. Petitioners claimed that the defendants' failure to prepare an EIS for the two proposed agreements violated the NEPA requirement that

> to the fullest extent possible * * *, all agencies of the Federal Government shall * * * include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible

> official on—(i) the environmental impact of the proposed action.

42 U.S.C. 4332(2)(C). The district court dismissed the case on the ground that petitioners then lacked standing. *Public Citizen* v. *United States Trade Representative*, 782 F. Supp. 139 (D.D.C. 1992) (*NAFTA I*). The court of appeals affirmed without reaching the issue of standing. *Public Citizen* v. *United States Trade Representative*, 970 F.2d 916 (D.C. Cir. 1992) (*NAFTA II*). The court of appeals held that petitioners could aver jurisdiction only under the APA, and that they had failed to identify any "final agency action" that would permit APA review under 5 U.S.C. 702, 704. 970 F.2d at 918-923. Although the court did not reach the merits, *id.* at 922 n.7, the court specifically noted that it was "impossible to decide with any confidence whether the (hypothetical) [trade] agreement will include measures 'significantly affecting the quality of the environment' in the *way* contemplated by NEPA," and "hard—probably impossible—to say whether any of them will affect plaintiffs (or their members) with enough directness to establish standing." *Id.* at 921 n.6.

4. The case giving rise to this petition was instituted in the district court shortly after President Bush announced agreement on NAFTA, but before he signed the agreement. On June 30, 1993, the district court issued an opinion concluding that the APA allows review of petitioners' NEPA claims, that petitioners have established standing to assert those claims, and that NEPA applies to NAFTA. Pet. App. 12a-32a. The district court ordered that USTR prepare an EIS under NEPA "forthwith." *Id.* at 34a.

5. The court of appeals reversed. Pet. App. 1a-11a. The court observed at the outset that NEPA does not create a private right of action and that, consequently, petitioners "must rest [their] claim for judicial review on the [APA]." Pet. App. 4a. Because the APA provides for judicial review only of "final agency action," the court of appeals stated that the threshold question in the case is "whether [petitioners] ha[ve] identified some agency action that is final upon which to base APA review." *Id.* at 5a.

In addressing that question, the court of appeals relied on *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992), in which this Court rejected an APA challenge to a census report that the Secretary of Commerce had prepared for transmittal to Congress by the President as part of a reapportionment calculation. The court of appeals explained that in determining "whether an agency action is final, '[t]he core question is whether the agency has completed its decisionmaking process, *and* whether the result of that process is one that will directly affect the parties.'" Pet. App. 5a (quoting *Franklin*, 112 S. Ct. at 2773). APA review was unavailable in *Franklin* "because the final action under the reapportionment statute (transmittal of the apportionment to Congress) was that of the President, and the President is not an agency." Pet. App. 5a (citing *Franklin*, 112 S. Ct. at 2773; *Armstrong* v. *Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991)). The court of appeals further observed that, in *Franklin*, "although the Secretary had completed her decisionmaking process, the action that would directly affect the plaintiffs was the President's calculation and transmittal of the appor-

tionment to Congress, not the Secretary's report to the President." Pet. App. 5a.

The court of appeals concluded that "[t]his logic applies with equal force to NAFTA," because the agreement could have "no effect on [petitioners'] members unless and until the President submits it to Congress." Pet. App. 6a. The court of appeals explained:

> Like the reapportionment statute in *Franklin*, the Trade Acts involve the President at the final stage of the process by providing for him to submit to Congress the final legal text of the agreement, a draft of the implementing legislation, and supporting information. 19 U.S.C. § 2903(a)(1)(B). The President is not obligated to submit any agreement to Congress, and until he does there is no final agency action. If and when the agreement is submitted to Congress, it will be the result of action by the President, action clearly not reviewable under the APA.

Ibid.

The court specifically rejected the proposition that NAFTA should be deemed "final" because agreement on a final text had been reached by the parties at the time of the complaint, reasoning that any agency action concerning NAFTA was "just as much a 'moving target' as the census report in *Franklin* because in both cases the President has statutory discretion to exercise supervisory power over the agency's action. It is completely within the President's discretion, for example, to renegotiate portions of NAFTA before submitting it to Congress or to refuse to submit the agreement at all." Pet. App. 6a.

The court also rejected petitioners' contention that the EIS requirement under NEPA is an independent statutory obligation giving rise to APA review of USTR's actions regardless of what action the President takes concerning the agreement. The court reasoned that the Secretary of Commerce's obligation to prepare the census report at issue in *Franklin*, like the asserted obligation of USTR to prepare an EIS, was an "independent statutory obligation," but one that could not affect the parties without subsequent action by the President and so could not give rise to APA review. Pet. App. 7a.

The court of appeals also addressed and rejected petitioners' assertion that adherence to the reasoning of *Franklin* would effectively undermine NEPA's EIS requirement because "often 'some other step must be taken before' otherwise final agency actions will result in environmental harm," and the related assertion that that reasoning would mean the "death knell" for judicial review of claims under NEPA's legislative EIS requirement. Pet. App. 7a. The court of appeals explained that "*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties," and that the Court in *Franklin* explicitly relied on "the importance of the President's role in the 'integrity of the process' at issue." *Ibid.* The President's responsibility for final action under the Trade Acts, the court said, "indicates that Congress deemed the President's involvement essential to the integrity of international trade negotiations." *Id.* at 7a-8a. In cases where "the President's role is not essential to the integrity of the process," the

court suggested, "APA review of otherwise final agency actions may well be available." *Id.* at 8a.

In a concurring opinion, Judge Randolph expressed doubt concerning that last suggestion, because he was "not prepared to say whether in NEPA cases, the act of proposing legislation constitutes final action under § 704 of the APA." Pet. App. 10a. Judge Randolph concluded, however, that this case presents no occasion to reach that question, because "regardless of whether the President's submission of NAFTA to Congress would be final action, there is no 'final' action that can be attributed to an 'agency.'" *Id.* at 11a.

6. Following the court of appeals' decision and petitioners' filing of this petition for certiorari, President Clinton submitted NAFTA and its implementing legislation to Congress according to the terms and procedures set forth in the Trade Acts. H.R. 3450, 103d Cong., 1st Sess. (1993); see 19 U.S.C. 2903. The House of Representatives approved the agreement and its implementing bill on November 17, 1993. 139 Cong. Rec. H10,048 (daily ed. Nov. 17, 1993). The Senate approved the agreement and the bill on November 20, 1993. 139 Cong. Rec. S16,712 (daily ed. Nov. 20, 1993).

The President signed NAFTA's implementing legislation on December 8, 1993. NAFTA and its related agreements have also been approved by Canada and Mexico through their political processes, and the agreement therefore will take effect, according to its terms, on January 1, 1994.

ARGUMENT

Petitioners contend that this Court should grant review in order to resolve a circuit conflict over the application of *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992). The precise question presented in this case is now moot, however, because Congress has approved NAFTA and has enacted legislation to implement the agreement. Accordingly, the preparation of an EIS would not assist petitioners in their stated purpose of informed participation in the legislative debate, nor would it serve any useful purpose. Further review by this Court would do nothing more than provide advice to lower courts about review of NEPA claims arising from hypothetical future trade agreements, agreements that may never affect the petitioners in this case.

Furthermore, review is not warranted in this case because the court of appeals correctly applied settled principles of law articulated by this Court in *Franklin* v. *Massachusetts*. The decision below does not conflict with any other appellate decisions, and is unlikely to be affected by this Court's decision in *Dalton* v. *Specter*, cert. granted, No. 93-289 (Oct. 18, 1993). Finally, the decision of the court of appeals is correct because it avoids serious constitutional questions concerning the separation of powers.

1. Congressional approval of NAFTA and enactment of its implementing legislation has eliminated any controversy between the parties to this case, thereby rendering the case moot.[2] Petitioners sought

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[2] The federal courts have uniformly held that alleged NEPA claims are moot when the challenged action has been completed. See, *e.g.*, *City of Romulus* v. *County of Wayne*, 634

an EIS to inform the participation of their organizations and their members in the administrative and legislative process culminating in the President's transmittal of the agreement and implementing legislation to Congress for a vote. See Pet. 26. That vote has taken place,[3] and it is therefore impossible for the Court to grant "any effectual relief whatever." *Church of Scientology* v. *United States*, 113 S. Ct. 447, 449 (1992). The petition is thus no more than a request for an advisory opinion as to "what the law would be upon a hypothetical state of facts" presented by future trade agreements. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

Petitioners nonetheless claim (Pet. 11) that this case is not moot because the controversy is "capable of repetition, yet evading review," in that the same issues may arise with respect to future trade agreements. There currently are no completed trade agreements that are candidates for congressional approval pursuant to the "fast-track" procedures, however, and it is speculative whether such agreements will emerge in the future and whether the

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F.2d 347, 348-349 (6th Cir. 1980); *Florida Wildlife Federation* v. *Goldschmidt*, 611 F.2d 547, 549 (5th Cir. 1980); *Friends of the Earth, Inc.* v. *Bergland*, 576 F.2d 1377 (9th Cir. 1978). That conclusion follows from the fact that NEPA's obligations are pre-decisional, and are intended to ensure "a fully informed and well-considered decision" before an agency takes action. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 558 (1978).

[3] Of course, if Congress had considered any information provided by the President or USTR about NAFTA to be inadequate, including information about environmental consequences of the agreement, Congress could have rejected the agreement on that basis.

timing of such agreements will preclude full litigation of the issues presented.

Moreover, the doctrine permitting assertion of jurisdiction in the exceptional circumstance in which an issue is "capable of repetition, yet evading review," requires more than a prediction that the conduct complained of may recur; it applies only where "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); see also *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983). In advance of the completion of a trade agreement, with specific terms and conditions, it is impossible to assess whose interests—environmental or otherwise—would be adversely affected by the implementation of the agreement.[4] The district court so ruled in the first NAFTA case when it dismissed petitioners' claims for lack of standing. See *NAFTA I*, 782 F. Supp. at 142.

Accordingly, in order for petitioners to establish jurisdiction on the basis that the issue presented is "capable of repetition, yet evading review," the Court would have to presume that petitioners' members

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[4] It is possible that the Uruguay Round of multilateral trade negotiations under GATT will yield an agreement in principle—but not a final agreement—by December 15, 1993, the deadline for the President to provide notice of his intention to enter into an agreement that would be subject to the fast-track rules. Even if that eventuality were to occur, however, this case would still be moot, because petitioners cannot demonstrate that any such agreement in principle would lead to the conclusion of a final agreement that would injure them in the same manner that they claim to be injured by NAFTA, nor can petitioners show that the issues in any future challenge to such an agreement would be the same as those in this case.

would be among those injured by the implementation of a future trade agreement, and that they would be injured in the same manner asserted here. Such a presumption is untenable, because the evidence upon which petitioners relied to establish standing in this case focused on two types of harms that are specific to NAFTA: harms to members along the United States-Mexico border from increased development, and harms to members from possible displacement of United States environmental health and safety laws that may result if specific terms of NAFTA are construed to conflict with those laws. Pet. App. 23a-28a. There is no certainty that such harms will threaten petitioners' members under another trade agreement, nor any basis on which to conclude now that those predicted future harms will give rise to standing. Thus, petitioners cannot satisfy the requirement that they "make a reasonable showing that [they] will again be subjected to the alleged illegality." *City of Los Angeles* v. *Lyons*, 461 U.S. at 109. Accordingly, this case is moot, and the petition should be denied on that ground.[5]

2. Petitioners have failed to identify any actual conflict between the decision of the court of appeals in this case and that of any other court of appeals.

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[5] For the reasons that follow, this case is not one that would warrant review on its merits. Accordingly, in our view, the procedure applicable to cases that become moot while pending on appeal or in this Court (see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)) is inapplicable, and certiorari should simply be denied. See 77-900 U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978); see also U.S. Br. as Amicus Curiae at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, No. 92-1123 (Nov. 30, 1993).

Accordingly, review of the decision below would not be warranted even if a live controversy were presented in this case.

a. Petitioners suggest (Pet. 20-25) that this Court should grant review because the lower federal courts are interpreting and applying this Court's decision in *Franklin* in an inconsistent manner. The only circuit conflict they point to, however, is that between the First Circuit in *Cohen* v. *Rice*, 992 F.2d 376 (1993), and the Third Circuit in *Specter* v. *Garrett*, 995 F.2d 404 (1993), over the question whether the APA authorizes judicial review of base closure recommendations of the Secretary of Defense and the Defense Base Closure and Realignment Commission. This Court has already granted a writ of certiorari in *Dalton* v. *Specter*, No. 93-289 (Oct. 18, 1993), to resolve the conflict between *Cohen* and *Specter*, but that conflict is not relevant to the decision of the court of appeals in this case.

In *Cohen*, the First Circuit applied the reasoning of *Franklin* to the Defense Base Closure and Realignment Act of 1990 and concluded that, as in *Franklin*, the President's role in transmitting base closure recommendations and in otherwise taking final action under the Act places those recommendations outside the scope of APA review. 992 F.2d at 381-382. In *Specter*, on the other hand, the Third Circuit concluded that, notwithstanding *Franklin*, there is a "constitutional aspect" to the claims in that case, and that "extra-APA review" was therefore required in order to ensure that the President met what the court deemed to be a constitutional requirement "to remain within the scope of his legal authority." 995 F.2d at 409. The Third Circuit held that the reason-

ing of *Franklin* supported its result, because *Franklin* permitted constitutional (as distinct from APA) review of claims rising from the census report there at issue. *Id.* at 408-409. The United States sought review in *Specter*, because the Third Circuit's reasoning cannot be reconciled with the holding in *Franklin* or with principles of sovereign immunity, and because the Base Closure Act demonstrates congressional intent to preclude review of the particular claims asserted in that case.

Petitioners' reliance on *Specter* is thus entirely misplaced. Petitioners never raised, and the courts below never considered, any argument that the NEPA claims presented in this case had a constitutional dimension that might support review on some basis other than that provided by the APA. This Court will generally not consider arguments that were not pressed or passed upon in the courts below (see, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)), and that practice is particularly appropriate where, as here, the underlying controversy is moot.

The other question presented in *Specter*—whether the Base Closure Act precludes judicial review for purposes of the APA—is also of no relevance to this case. The Court's resolution of that issue will have no impact on the correctness of the court of appeals' ruling below that petitioners have failed to identify any final agency action subject to APA review. Accordingly, there is no reason either to grant the petition in this case or to hold it pending disposition of *Specter*, because the questions presented in that

case were either waived by petitioners or are of no possible relevance here.

b. Petitioners also err in contending (Pet. 12-16) that the application of *Franklin* by the court of appeals "conflicts with two decades of judicial review under NEPA." Pet. 12. According to petitioners, courts have exercised review in numerous NEPA cases, including numerous cases involving agency proposals for legislation, "regardless of whether the underlying action involves presidential authority." *Ibid.*

Petitioners' claim of conflict disregards the narrow scope of the decision below. The court of appeals expressly stated that "*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties," Pet. App. 7a, and the court noted that APA review "may well be available" in cases where "the President's role is not essential to the integrity of the process." *Id.* at 8a. Thus, the court's reasoning does not imply, and indeed disavows, petitioners' suggestion that the decision below precludes APA review wherever "final agency action" may implicate presidential authority.

Petitioners' recital (Pet. 13-16 & n.3) of numerous cases in which courts undertook judicial review of NEPA compliance, and in which neither the scope of the APA nor action by the President was placed in dispute, therefore does not demonstrate the existence of a circuit conflict or support the assertion that the decision below threatens the scope of judicial review of NEPA claims on all matters in the executive Branch on which the President may possess ultimate

authority. In the first place, nearly all of the cited cases antedate *Franklin*. Thus, those cases obviously cannot serve to demonstrate the existence of a circuit conflict over the proper application of the principles of APA review announced in *Franklin*.

Moreover, many of the cases on which petitioners rely were decided without reference to the APA, on the erroneous assumption that NEPA created an implied right of action independent of the APA. See, *e.g.*, *Izaak Walton League of America* v. *Marsh*, 655 F.2d 346, 352 (D.C. Cir. 1981). That assumption obviated the need to address whether review of the NEPA claims at issue rested on a final agency action within the meaning of the APA. Petitioners do not claim that NEPA contains a private right of action, however (cf. *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 882-883 (1990)), and instead seek judicial review under the APA. Accordingly, those cases are inapposite.

Furthermore, petitioners' argument that the decision below conflicts with NEPA cases involving presidential authority cannot withstand scrutiny. None of the court of appeals cases cited in the petition involves the issue addressed by *Franklin*: the relationship between the judicial review provisions of the APA and special statutory schemes under which the final decisionmaking authority for the Executive Branch rests with the President personally.

Of the cases cited by petitioners, only those concerning decisionmaking under the Wilderness Act of 1964, 16 U.S.C. 1131-1136, involved a statutory scheme similar to that at issue in this case. Under that Act, the cabinet Secretary with jurisdiction over the federal lands involved recommends to the President

whether a specific area should be designated a wilderness area by Congress. The President is empowered to accept or reject such recommendations and transmit such recommendations as he sees fit to Congress for legislative action.

Cases involving judicial review of NEPA claims under the Wilderness Act have not presented the issue addressed in *Franklin* and in this case of the propriety of APA review where only the President may take final action. *California* v. *Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980), modified, *California* v. *Block*, 690 F. 2d 753 (9th Cir. 1982), involved a decision by the Secretary of Agriculture that not only determined which areas the President should recommend for inclusion in the wilderness system, but that also determined that the areas not designated could be developed for non-wilderness use without further evaluation. The court of appeals characterized the latter aspect of the agency's action as a crucial decision for future management of those lands, and reviewed the asserted NEPA claims on that basis. See 690 F.2d at 762. In other words, the court was *not* undertaking review of NEPA claims arising from the agency's recommendations to the President concerning wilderness designation, but rather those arising from the agency's decision to permit development in the other lands. *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508 (9th Cir. 1992), was a similar case limited to Forest Service decision-making in a single National Forest, in which the President's exercise of discretion likewise was not addressed. Thus, petitioners have failed to point to any appellate case that actually decides the question

presented in this case in a manner different from the result reached by the court below.[6]

c. Petitioners seek to bolster their claim of a conflict by reference to purportedly analogous statutes, including the Freedom of Information Act (FOIA), 5 U.S.C. 552b, and the Federal Advisory Committee Act (FACA), 5 U.S.C. App., at 1175-1180, §§ 1-12. Unlike NEPA, however, those statutes impose obligations—the former to release agency records and the latter to follow specific procedural requirements in the use of advisory committees—that arise regardless of whether agency action, or a final agency action, occurs at all. As petitioners concede, moreover, FOIA has an independent provision for judicial review that is more expansive than the APA. Pet. 24 n.5; see 5 U.S.C. 552(a)(4)(B). Accordingly, neither those statutes nor the hypothetical examples offered by petitioners (Pet. 24) establish a basis for review of the decision in this case.

3. Review is also unwarranted in this case because the judgment below is correct. The court of appeals properly concluded that the principles announced in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992),

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[6] Petitioners do identify an apparent conflict between the decision below and one district court's ruling, in a case arising under the Wilderness Act, that the failure to prepare an EIS, without more, may constitute a "final agency action" supporting APA review of NEPA claims. *Colorado Environmental Coalition* v. *Lujan*, 803 F. Supp. 364 (D. Colo. 1992). That ruling was made in an interlocutory decision that has not yet been subject to appellate review, and the case has not yet resulted in a final judgment. Accordingly, a genuine conflict on this issue may never arise at the appellate level, and review of the issue in this case would be premature.

concerning the scope of APA review preclude the exercise of review here.

a. Petitioners do not dispute that judicial review of the NEPA claims presented in this case is available only under the APA's provision for review of "final agency action." 5 U.S.C. 704. Indeed, petitioners identified no other basis for review before the district court and the court of appeals. The APA requires both that the challenged action be final (*ibid.*) and that the final action be taken by an "agency," not the President. *Armstrong* v. *Bush*, 924 F.2d 282, 288-289 (D.C. Cir. 1991).

In *Franklin*, this Court unequivocally held that the APA's finality requirement bars APA review where, as with NAFTA, the President is charged with taking final action. *Franklin* v. *Massachusetts*, 112 S. Ct. at 2773-2776. The court of appeals recognized that the Trade Acts, like the statute at issue in *Franklin*, "involve the President at the final stage of the process," Pet. App. 6a, and explicitly provide that only the President may take action that can be deemed "final" with respect to trade agreements such as NAFTA.

The President must provide the statutory notification of his intention to enter a free trade agreement, 19 U.S.C. 2903(a)(1); the President must sign the agreement; and the President must submit the final agreement, implementing legislation, and supporting information to Congress, 19 U.S.C. 2903(a)(1)(B). As the court of appeals pointed out, "[t]he President is not obligated to submit any agreement to Congress, and until he does there is no final action. If and when the agreement is submitted to Congress, it will be the

result of action by the President, action clearly not reviewable under the APA." Pet. App. 6a.

Significantly, petitioners do not contend that the court of appeals erred in concluding that, as in *Franklin*, NAFTA presents a case in which "the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties." Pet. App. 7a. Nor do petitioners take issue with the court's conclusion that "Congress deemed the President's involvement essential to the integrity of international trade negotiations." *Id.* at 7a-8a; see *Franklin*, 112 S. Ct. at 2775 (President's role is "important to the integrity of the process" and thus beyond APA's scope). Accordingly, petitioners' claim that the court misapplied *Franklin* must be rejected.

b. The correctness of the judgment below is reinforced by two principles of construction that compel the result reached by the court of appeals. The first is the "cardinal principle" that where a proposed interpretation of a statute would raise "serious doubt" about the statute's constitutionality, courts should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 465-466 (1989). Judicial "reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government." *Id.* at 466. The second principle of construction that supports the judgment below is the corollary requirement that "[w]hen Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its

intent clear." *Armstrong*, 924 F.2d at 289; see *Franklin*, 112 S. Ct. at 2775.

Applying those principles, *Franklin* made clear that any construction of the APA permitting review where the final action may be taken only by the President would directly threaten the constitutional separation of powers. *Franklin*, 112 S. Ct. at 2775 (refusing APA review "[o]ut of respect for the separation of powers and the unique constitutional position of the President"); *Armstrong*, 924 F.2d at 289 (emphasizing that review might "significantly alter the balance between Congress and the President"). While the court of appeals here expressly declined to address the government's "weighty" constitutional arguments (Pet. App. 8a), the APA review sought by the petitioners implicates the separation of powers because such review contemplates judicial interference with important Article II powers that were not at issue in *Franklin* or *Armstrong*: exercise by the President of his express authority to submit to Congress whatever legislation he sees fit (see U.S. Const. Art. II, § 3, Cl. 2), and of his far-reaching power over the Nation's foreign affairs.[7]

Any judicial imposition of an EIS requirement on the drafting and preparation of NAFTA and similar trade agreements would directly impinge on the

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[7] That power derives from the several constitutional provisions that vest the President with executive and foreign affairs powers, including the "Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. Art. II, § 2, Cl. 2. See also U.S. Const. Art. II, § 1, Cl. 1 ("The executive Power shall be vested in a President."); Art. II, § 2, Cl. 1 ("The President shall be Commander in Chief."); Art. II, § 3 ("he shall receive Ambassadors and other public Ministers").

President's ability to exercise control over the content and timing of his submissions to Congress. The Constitution expressly grants the President the power to "from time to time * * * recommend to [Congress's] Consideration such Measures *as he shall judge* necessary and expedient." U.S. Const. Art. II, § 3, Cl. 2 (emphasis added). That textual grant of authority to the President plainly confers power to transmit legislation to Congress as the President in his sole discretion deems appropriate, and cannot be constricted by judicially enforced requirements.

Moreover, NAFTA and its related agreements were the subject of sensitive international negotiations and significant foreign policy commitments by the President during the pendency of the action below. The court of appeals' construction of the APA in this case thus gave proper weight to this Court's repeated admonition "that matters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952)); see also *Regan* v. *Wald*, 468 U.S. 222, 242 (1984); *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). The court of appeals' decision properly defined the scope of review so as to avoid conflict between APA review and the President's authority to negotiate and conclude trade and other international agreements, which lies at the core of the President's power over foreign relations. See *Curtiss-Wright*, 299 U.S. at 319 ("the President alone has the power to speak or listen as a representative of the nation").

The court of appeals' decision thus adheres to this Court's teaching that federal courts should strive to avoid intrusion on such core Article II powers, even where the intrusion consists of procedural requirements imposed in the first instance on an agency. See *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989) (construing FACA narrowly to avoid constitutional issue presented by applying the statute to the Department of Justice's practices in advising the President on judicial nominations). Thus, the significant constitutional issues that would be raised by review of petitioners' NEPA claims belie any suggestion that the court of appeals erred in not adopting petitioners' broader reading of the APA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PUBLIC CITIZEN AND SIERRA CLUB,

Petitioners,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In The

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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION AND SUMMARY OF REPLY

Respondent urges the Court to deny the petition because it contends that (1) there is no present conflict among the circuits on the applicability *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), to the environmental impact statement ("EIS") requirement of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332; and (2) this case is moot because the particular trade agreement for which an EIS was sought has been approved by Congress. Although technically correct, these contentions seek to divert the Court's attention from the strongest reason

for granting review -- this case raises important issues resolved by the court below in a way that conflicts with longstanding precedents of this Court and of the lower courts.

By focusing solely on post-*Franklin* court of appeals' cases, rather than on the statutory provision on which *Franklin* was based, the government unjustifiably narrows the universe of conflicts warranting this Court's consideration. In particular, the government's opposition completely ignores the conflict, recognized by Judge Randolph in his concurrence below, between the decision here and this Court's previously unquestioned pronouncement of when NEPA challenges may be brought under the Administrative Procedure Act ("APA"), *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), as well as this Court's application of that principle in a case where the President had a role similar to the one that he had here. *Andrus v. Sierra Club*, 442 U.S. 347 (1979).

As to mootness, this case falls squarely within the exception to mootness for cases capable of repetition, yet evading review. While the issue is moot as to the North American Free Trade Agreement ("NAFTA"), the President notified Congress on December 15, 1993, of his intention to enter into the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT"), which he will then sign by April 15, 1994, and thereafter submit to Congress for approval. *See* 19 U.S.C. § 2903(a)(1)(A), as amended by Pub. L. No. 103-49, 107 Stat. 239 (1993). Since the Uruguay Round agreement was part of petitioners' first NEPA challenge against respondent, *Public Citizen v. Office of the U.S. Trade Representative*, 970 F.2d 916 (D.C. Cir. 1992), the President's official notification of his intent to enter into it eliminates any claim that the dispute between the parties will not recur, and hence, this case is not moot. If the Court has any doubt about this proposition, it should do what it did last term in *Helling v. McKinney*, 113 S. Ct. 2475, 2482 (1993), and decide the threshold issue that was

decided below, leading to outright dismissal of the case, and then remand the case for development of a record so that the issue of mootness, the related issue of standing, and, if appropriate, the merits can be decided by the lower courts.

REASONS FOR GRANTING THE WRIT

A. The Question Presented Warrants Review.

In responding to the petition, the government's opposition is most noteworthy for what it does not address. Most striking is the government's complete failure to mention *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976), in which this Court established that the time for judicial intervention in a NEPA case is "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." *See also id.* at 406 ("the moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation on a *proposal* for federal action.'") (internal citation omitted).

Under this test, the courts have uniformly considered an agency's failure to issue an EIS with its report or recommendation on a proposal to be final agency action reviewable under the APA. *See* Pet. at 12-16. Nonetheless, the court below declined to review the Office's refusal to prepare an EIS on its recommendation to enter into NAFTA, because it construed the challenged action to be the NAFTA itself, rather than the agency's NAFTA recommendation without an EIS. In this respect, the decision below deviates sharply from the past two decades of judicial review of NEPA cases, and from the only other post-*Franklin* NEPA case involving a matter on which the President has statutory authority to make the final decision. *Colorado Environmental Coalition v. Lujan*, 803 F. Supp. 364 (D. Col. 1992).

The government ignores both *Kleppe* and the marked

deviation of the D.C. Circuit's majority opinion from the *Kleppe* standard. In contrast, Judge Randolph, in his separate concurrence below, recognized that the courts would need to reconcile "*Franklin*'s direct-effects-on-the-parties test, as applied to NEPA suits . . . with the portion of *Kleppe*" identifying the appropriate time for judicial review in NEPA cases.

This petition seeks such a reconciliation with both *Kleppe* and the long line of lower court cases applying that standard to permit judicial review of NEPA claims concerning legislative proposals and presidential decisions. The government does not dispute petitioners' contention that the courts have reviewed legislative EIS cases, even though the President has the constitutional authority to submit legislation to Congress. Pet. at 13-14. The government does not even acknowledge the many legislative EISs cited by petitioners, except to note that one such case was decided without reference to the APA. *See* Opp. at 19.

Nor does it discuss the line of cases in which the courts, including this Court, decided whether appropriation requests submitted to Congress by the President are subject to the legislative EIS mandate. Pet. at 14; *Andrus v. Sierra Club*, 442 U.S. 347 (1979). Appropriations requests are analogous to trade agreements in that the President, both under the Constitution and in practice, submits them to Congress, yet the courts have reviewed agencies' NEPA compliance under the APA once the agency has made its budget proposals without an EIS, notwithstanding the President's role in the process.

Several other NEPA cases have reviewed agencies' NEPA compliance with respect to international agreements entered into by the President. *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 752 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991) (presidential agreement to remove obsolete munitions from Germany); *see also*

Wisconsin v. Weinberger, 745 F.2d 412, 415 (7th Cir. 1984) (pursuant to statutory mandate, the President submitted to Congress a plan to reactivate a submarine communications system, which was a proposal developed by the Secretary of the Navy). Under the decision below, judicial review of those actions would be unavailable because the President, not the agency, has the constitutional or statutory authority to take the final steps to enter into international agreements.

Tacitly conceding that the D.C. Circuit decision, on its face, deviates from judicial review of EIS cases concerning legislative proposals and international agreements, the government suggests that the decision below applies only to "special statutory schemes under which the final decisionmaking authority for the Executive Branch rests with the President personally." Opp. at 19. Of course, whether the D.C. Circuit decision can be fairly limited to "special" statutory schemes goes to the merits of the reviewability question. Such a narrow reading is contradicted by the majority opinion itself, which states that APA review is unavailable where "the President has final constitutional *or* statutory responsibility for the final step necessary for the agency action directly to affect the parties." Pet. App. 7a (emphasis added). Moreover, in this case, respondent relied as much, if not more, on the President's constitutional power to submit legislation to Congress and to negotiate treaties, than it did on the President's specific statutory decisionmaking power. Notably, the government has not foresworn reliance on *Franklin* or the decision below in cases where there is no "special" statutory scheme. It is precisely because the decision below is not so limited that it has thrown the administration of NEPA into disarray and calls for this Court to clear up the confusion.

Rather than confront the extensive body of cases reviewing NEPA claims analogous to the one found unreviewable below, the government contends that this Court should not review this case because there is no post-*Franklin* circuit conflict on the question of how to apply *Franklin* to

NEPA cases. That much is true. However, there is a fundamental conflict between the approach taken by the D.C. Circuit and the standard enunciated in *Kleppe*. There is also a conflict between the D.C. Circuit's preclusion of APA review and the position taken in virtually every other legislative EIS case, including *Andrus*, and every other NEPA case concerning a matter on which the President made or could have made the final determination, by virtue of his statutory or constitutional powers. Pet. at 12-16. Therefore, the D.C. Circuit's decision is a marked departure from the settled APA principles on which *Franklin* itself is based.

It is, after all, the APA, and not the language in *Franklin*, that controls the availability of APA judicial review. It has long been recognized that the APA embodies a broad presumption of reviewability that may be overcome only upon a showing of clear and convincing evidence that Congress intended to preclude judicial review. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). This presumption is at its zenith with respect to claims that an agency has violated a nondiscretionary statutory mandate, like NEPA's EIS requirement. *See, e.g.*, *Bowen*, *supra*. Where an agency has taken its final step that makes the EIS requirement applicable, *i.e.*, it has made its recommendation on a proposal for legislation or other major federal action, APA review is available, as this Court held in *Kleppe*. Neither *Franklin* nor the President's involvement in the matter changes that result.

The government and the court below reached the opposite conclusion because of their erroneous identification of the challenged action as NAFTA itself, rather than the agency's failure to include an EIS in its final recommendation on NAFTA. Respondent's Second Question Presented at i; Opp. at 22-23; Pet. App. 6a. Since petitioners are not challenging the NAFTA, the President's decisions to enter into the NAFTA and to submit it to Congress are irrelevant to the availability of APA review here.

What petitioners are challenging is respondent's failure to include an EIS in its recommendation to the President to enter into the NAFTA. Respondent has never disputed that it is charged, by statute, with being the chief negotiator of international trade agreements, and that, in the course of playing such a role in the NAFTA negotiations, it made a recommendation to enter into the NAFTA, which would require preparation of an EIS, if NEPA applies to trade agreements.

In this respect, NEPA is like the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, which the government concedes requires agencies "to follow specific procedural requirements." Opp. at 21. Like NEPA claims, judicial review of FACA violations is obtained under the APA because there is no separate cause of action in the substantive statute. However, courts have found FACA violations to be the final agency action under review, without waiting for the closed meeting or withheld records to lead to a decision harming the litigant. *See, e.g., Food Chemical News v. Advisory Committee on the Food and Drug Administration*, 980 F.2d 1468 (D.C. Cir. 1992); *National Security Archive v. Archivist of the United States*, 909 F.2d 541 (D.C. Cir. 1990); *Public Citizen v. National Economic Commission*, 703 F. Supp. 113 (D.D.C. 1989). Similarly, this Court decided *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), under the APA, even though the committee at issue provided advice on judicial nominees to be passed onto the President, who alone has the constitutional power to nominate federal judges.[1]

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[1]The separation of powers concerns raised in that case shaped the Court's decision, but were never asserted as a basis for declining to hear the case at all. The government converts similar arguments into a justification for construing the APA to preclude judicial review, even though it never

(continued...)

For the same reason, there is final agency action once an agency fails to include an EIS in its recommendation on a proposal or prepares an inadequate one. *Kleppe*, *supra*. Because the decision below reached the opposite and erroneous conclusion, which is at odds with *Kleppe* and its extensive progeny, this Court's review is warranted.

The fact that this Court has granted the petition for a writ of certiorari in *Dalton v. Specter*, No. 93-289, in which *Franklin*'s effect on the reviewability of agency actions is also at issue, does not eliminate the need for review in this case. The government's attempts to distinguish *Dalton* are misguided. The portion of *Dalton* that challenges the agency's failure to hold public hearings or publish information at the time specified in the statute is directly analogous to the failure to prepare an EIS here. Indeed, in its reply brief in support of the petition in *Dalton*, the government specifically pointed to this case as being in conflict with *Dalton*, thereby supporting the need for this Court's review. Reply at 8 n.8.

Although the two cases raise similar statutory claims, *Dalton* seeks to enjoin implementation of the President's decision, while petitioners here merely seek to compel agency compliance with NEPA. Moreover, because the Third Circuit relied in its second decision on the Constitution, not the APA, as the basis for judicial review, and because *Dalton* presents an additional basis for reversal that is not dependent on *Franklin*, this Court's resolution of *Dalton* may not assist the lower courts in clarifying *Franklin*'s application to NEPA and other procedural statutes.

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[1](...continued)
made such an argument below. Opp. at 23-26. In any event, those arguments, which petitioners strongly contest, are properly directed to the merits of petitioners' claims, not to the threshold reviewability issue.

It was for these reasons that the petition urged the Court to hear this case with *Dalton*. In order to facilitate this Court's consideration of the two cases together, petitioners filed their petition in printed form just two weeks after the ruling of the D.C. Circuit, which was one week before this Court considered the *Dalton* petition. Although petitioners asked respondent to file its opposition promptly to keep this case on a schedule as close as possible to that in *Dalton*, respondent took nine weeks to file its opposition. As a result, by the time this Court considers this petition, the principal briefs in *Dalton* will have been filed, although, as of this date, oral argument has not been scheduled. Nonetheless, to enable the Court to hear the cases together, petitioners are willing to file their brief on the merits within three weeks and make whatever other adjustments are necessary to permit joint consideration with *Dalton*. At a minimum, this Court should hold this petition pending the disposition of *Dalton*.

B. This Case Falls Within the Mootness Exception for Matters Capable of Repetition, Yet Evading Review.

Now that Congress has approved the NAFTA, petitioners agree that their demand for an EIS on the NAFTA is moot. However, this case falls within the mootness exception for matters that are capable of repetition, yet evading review. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

Although this particular case arose in the context of NAFTA, it is part of a larger controversy concerning respondent's refusal to comply with NEPA with respect to trade agreements generally. During the course of this litigation, and the case that preceded it, respondent admitted that it had never prepared an EIS on a trade agreement. Moreover, the Office made it crystal clear that it had no intention of ever doing so, because it believed (and vigorously defended its belief) that NEPA is inapplicable to

trade agreements, regardless of their environmental effects. It is for that reason that the complaint in this case sought a declaration that respondent has violated NEPA by failing to prepare EISs on the NAFTA *and other trade agreements* that it has negotiated and that it is negotiating. Court of Appeals' Joint Appendix 12.

Recent developments have removed any doubt as to whether the challenged action will recur. On December 15, 1993, the President officially notified Congress of his intention to enter into the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT"). That notification came in time for the President to submit the agreement to Congress for approval under fast-track procedures, provided he signs it by April 15, 1994. *See* 19 U.S.C. § 2903(a)(1)(A), as amended by Pub. L. No. 103-49, 107 Stat. 239 (1993).

The Uruguay Round agreement was part of petitioners' initial demand for EISs on trade agreements, and their first lawsuit to compel the preparation of such EISs. *Public Citizen v. Office of the U.S. Trade Representative*, 970 F.2d 916, 917 (D.C. Cir. 1992). Accordingly, there is more than a substantial likelihood that the dispute between the parties will continue to recur; it has, in fact, arisen once again during the pendency of this petition.

There is also every reason to believe that any case seeking an EIS on the Uruguay Round would evade complete judicial review, just as this one has. By way of example, this case was filed within weeks of the conclusion of the NAFTA negotiations, and the case was expedited in the lower courts. Nonetheless, the issue of whether the courts may decide the merits is still unresolved more than 15 months later. In any future challenge, the first issue to be resolved will be the precise one presented here: whether, under *Franklin*, the case may be heard under the APA. The government's many defenses and arguments would then need to be resolved. As occurred here, Congress is likely to

approve the trade agreement before the appeals and remands run their course, thereby rendering the particular claim moot.

The government argues that this case is not within the mootness exception because petitioners may not be able to demonstrate that they have standing to challenge the failure to prepare an EIS on another trade agreement. Opp. at 14-15. That contention depends on extensive facts that are not in the record, and issues that were not decided by the D.C. Circuit or the district court. Accordingly, it should not be decided by this Court, and certainly not at the petition stage.

Moreover, under the decision below, future cases are likely to be derailed without reaching the standing issue. The D.C. Circuit's decision that APA review is unavailable closes the door to challenges to the Office's NEPA compliance with respect to any trade agreement, regardless of its terms. This threshold issue must be resolved before the courts have the authority to decide other issues in connection with a NEPA challenge to the Uruguay Round or any other trade agreement. Accordingly, this Court should hear this case, and if it decides that APA review is available, it should remand for the D.C. Circuit to determine whether the case falls within the mootness exception. This was the approach followed in *Helling v. McKinney*, 113 S. Ct. 2475, 2482 (1993), where this Court decided the threshold issue that led to outright dismissal of the case below, and then remanded the case for development of a record on the issue of mootness and the merits.

Finally, the government makes the anomalous suggestion in a footnote that this Court should decide that this case is moot, but nonetheless deny the petition outright. Opp. at 15 n.5. That suggestion runs directly counter to the rule that a decision should be reversed or vacated where mootness deprives the losing party of the opportunity to have it reviewed. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). Acknowledging the weakness of its position, respondent cites no cases adopting this approach,

but relies entirely on its own assertions in other briefs filed by the government itself. Given the unprecedented nature of the decision below, it would be wholly inappropriate to let the D.C. Circuit's decision stand, if mootness precludes review by this Court.

CONCLUSION

For all of these reasons, the petition should be granted or held pending resolution of *Dalton*.

Respectfully submitted,

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OCTOBER TERM, 1993

PUBLIC CITIZEN AND SIERRA CLUB, PETITIONERS

v.

UNITED STATES TRADE REPRESENTATIVE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Pursuant to Rule 15.7 of the Rules of this Court, the Solicitor General, on behalf of the United States Trade Representative, submits this supplemental brief to advise the Court of recent actions by the President that were anticipated in our brief in opposition to the petition for a writ of certiorari.

1. Subsequent to the filing of our brief in opposition, the President announced significant developments in the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT). See U.S. Br. in Opp. 14 n.4 (noting possibility of an agreement in pending Uruguay Round negotiations). Those negotiations began in 1986 and involve more than 100 participating countries. On December 15, 1993, the

President announced that "[a]fter seven long years the conclusion of the Uruguay Round of multilateral trade negotiations is at hand." Letter from the President of the United States to the President of the Senate (Dec. 15, 1993), *reprinted at* 58 Fed. Reg. 67,264 (1993). Accordingly, pursuant to the fast-track procedures of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. 2903(a)(1), the President provided notice to Congress of his intent to enter into the agreements resulting from those negotiations on April 15, 1994. 58 Fed. Reg. 67,267 (1993).

The Uruguay Round negotiations have not yet resulted in a final agreement text. Rather, the negotiations have yielded agreement in principle in 21 of the major areas addressed in the negotiations. See 58 Fed. Reg. 67,268-67,302 (1993) (executive summary of the results of the negotiations). Negotiations to resolve outstanding differences and to seek further agreements will continue between now and April 15, 1994. For example, the United States intends to seek further commitments in market access negotiations that will take place between now and February 15, 1994, which is the deadline for submission of draft tariff schedules. See *id.* at 67,269. For this reason, the President cautioned that considerable work remains before an agreement and any needed implementing legislation will be ready for submission to Congress:

> In order to ensure more open, equitable and reciprocal market access, in certain agreements we have made U.S. obligations contingent on receiving satisfactory commitments from other countries, and we will continue to work to ensure that the best possible agreement for the United

> States is achieved. I will not enter into any agreement unless I am satisfied that U.S. interest[s] are protected.

Id. at 67,267.

2. As we explain in our brief in opposition (Br. in Opp. 12-15), petitioners' challenges to the North American Free Trade Agreement (NAFTA) are moot, and this case is not one that is "capable of repetition, yet evading review." The President's notice concerning the Uruguay Round does not undermine the validity of our mootness argument.

a. The existence of an agreement in principle in the Uruguay Round of trade negotiations does not demonstrate that petitioners' challenge to the North American Free Trade Agreement is "capable of repetition." Even if this Court assumes that the continuing negotiations among the parties to the Uruguay Round will result in a completed and final text of an agreement for the President's signature by April 15, 1994, there is no basis on the current record on which to determine how any such new agreement would affect petitioners. Accordingly, there can be no "reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); see also *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983).

As explained in our brief in opposition (Br. in Opp. 15), petitioners' claim to standing in this case was premised on two types of injuries to their members: (1) harms to members exposed to environmental conditions along the United States-Mexico border that allegedly might be exacerbated by adoption of NAFTA; and (2) harms to members from possible

displacement of United States environmental, health, and safety laws that might result if specific terms of NAFTA are construed to conflict with those laws. Pet. App. 23a-28a. With regard to the first type of asserted harm, there is no basis on which to assume that a Uruguay Round agreement, which would encompass trade among more than 100 nations spanning every inhabited continent in the world, would threaten harms to petitioners' members that are the same as, or even comparable to, those that petitioners attribute to NAFTA. The latter agreement encompasses trade among three nations on one continent and uniquely affects a border region suffering from acute environmental problems. The record on those alleged harms, as it stands, thus does not support any claim that petitioners may again be subjected to the same injuries as a result of a final Uruguay Round agreement.

With regard to the possible effect on United States laws of a final Uruguay Round agreement, there is at present no basis for determining whether the text of such an agreement would have an effect on those laws that would be in any sense comparable to the impact that petitioners attribute to NAFTA. To the extent that the consequences of the new agreement may be different, the current record obviously is inadequate for this Court to determine whether those consequences would give rise to a cognizable harm at all, let alone a "repetition" of the harm identified with NAFTA. To the extent that those consequences may be similar, the current record is also inadequate, because there is no actual text of a Uruguay Round agreement or implementing legislation that would permit the Court to determine whether that agreement might threaten any harm to petitioners beyond

that already presented by existing law as modified by NAFTA and its implementing legislation. In short, there is no basis for concluding from the agreement in principle reached in the Uruguay Round that petitioners' allegations of injury from NAFTA are capable of repetition, or indeed that petitioners will even have standing to challenge a final Uruguay Round agreement.

b. In addition, the prospect of an agreement in the Uruguay Round provides no basis on which to assume that any NEPA claims asserted by petitioners with respect to the forthcoming agreement will evade judicial review. Under the fast-track procedure, the President's submission of the agreement to Congress is not expected before April 15, 1994, and the President has discretion to postpone submission of the agreement and any implementing legislation as he deems appropriate. Indeed, NAFTA itself was not submitted to Congress until more than a year after the initial statutory notice to Congress. Thus, there will be time for petitioners to assert any challenges they may have to a final Uruguay Round agreement, and for judicial review of those challenges (and of the government's countervailing contentions).

Accordingly, petitioners' claims are not "capable of repetition, yet evading review," and review by this Court is not warranted.

For the reasons set forth above and in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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